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THE LAW  
OF  
Passenger and Freight  
ELEVATORS.

SECOND AND REVISED EDITION.

By <sup>James</sup> J. A. WEBB,  
Of the St. Louis Bar.

AUTHOR OF A TREATISE ON THE LAW OF INTEREST AND USURY;  
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JOURNAL, THE CENTRAL LAW JOURNAL, THE  
AMERICAN LAW REVIEW, ETC.; AND LEC-  
TURER ON THE LAW OF TORTS IN  
BENTON COLLEGE OF LAW  
OF ST. LOUIS.

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## PREFACE TO THE FIRST EDITION.

With the intention of writing a magazine article on the subject of passenger and freight elevators, I began examining the authorities; but soon discovered that within the last half dozen years the cases had so increased in number and importance as to permit a brief treatise on this new subject. Accordingly, I have collected what I believe to be all the cases to date, digested them and classified the legal points as well as I was able to. It will be observed that the immaturity of the subject compelled me to occasionally write independent of direct decisions; but where I have done so I believe that I have followed established principles and correctly stated the law. To make this little book exhaustive I have dealt in details; to render it acceptable as authority in the courts I have freely quoted the opinions of the highest State courts.

J. A. W.

St. Louis, Mo.

August 7th, 1896.

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## PREFACE TO THE SECOND EDITION.

Since the publication of the first edition of this limited treatise upon a special subject, the frequent requests for references to the late cases suggested the propriety of a new edition. In preparing the first edition reliance was misplaced upon the general digests, which have very poorly classified their notes upon this subject. Consequently, a number of cases were omitted. In preparing this edition, I have endeavored to revise and enlarge my former work, as well as add the subsequent cases. I trust that its use may save my brethren at the bar much tedious research and to some extent relieve the difficulty of collating the authorities upon this subject.

J. A. W.

St. Louis,

August 7th, 1905.

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Tennessee.

Utah.

Washington.

Wisconsin.





THE LAW  
OF  
Passenger and Freight Elevators.

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CHAPTER I.

ELEVATORS AS CARRIERS.

- § 1. Definition.
- § 2. Right to erect.
- § 3. As carriers.
- § 4. Passenger elevators.
- § 5. Passenger elevators — Treadwell v. Whittier.
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§ 1. **Definition.** — The elevator is a mechanical contrivance for vertically carrying persons or  
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freight. It usually consists of a car or cage suspended by movable cables in an inclosed shaft or well up and down which the car may be moved by the force of electricity, steam, compressed air, or other mechanical agency, under the control of a motorman within the car. Freight elevators are sometimes referred to as "hoists" and in England all elevators are called "lifts."

§ 2. **Right to erect.** — It is curious that the right to erect and use so valuable and convenient an invention as an elevator should have been challenged in the courts; but this was done by counsel in a recent Wisconsin case. It was here claimed that the placing of a passenger elevator in a building was a breach of the duty, imposed by the common law, to avoid acts the natural and probable consequence of which would be dangerous to the lives and persons of others. The court very properly refused to sustain this contention, holding that "Elevators such as this are in such universal use that we cannot say that one placed in position and in use is *per se* a machine, device or appliance imminently dangerous to the lives of others, or that serious injury to any person using, operating, or approaching, or being near one would be a natural or probable consequence of such use." (*Ziemann v. Kieckhefer Elevator Mfg. Co.*, 90

Wis. 497; 63 N. W. Rep. 1021. See Donnelly v. Jenkins, 58 How. Pr. 254.)

§ 3. **As carriers.** — Elevators are carriers, and as such they may carry for the public in general, in which event they are common carriers; or they may carry only for the owner or a select few, in which case they are private carriers. Again, elevators may be operated for a consideration or gratuitously, for the carrying of both freight and passengers or for the exclusive carriage of either. The owners of public elevators have the right to adopt and observe reasonable rules for their regulation; thus, frequently in very tall buildings elevator cars known as “through cars” are run according to schedules permitting them to stop only at a limited number of specified floors. This is a reasonable rule and no passenger can insist that it be either violated or abolished.

In all these, and in many other, respects the duties, rights and liabilities of the owners of elevators are the same as those of other carriers. There is no distinction in law between carrying horizontally and carrying vertically. However, although there are no cases upon the point, it seems that reason favors the exacting of greater caution on the part of those who carry vertically, since they incur the great danger of opposing the inexorable law of gravitation.

While the cases concerning elevators have not been sufficiently numerous or varied in their character to raise for judicial determination all the points of comparison between elevators and other carriers, they have been uniform in concluding that the general principles governing all are the same and their application similar. See the authorities cited in the several sections of this chapter, and see *Southern Building and Loan Association v. Lawson*, 97 Tenn. 367; *Donovan v. Gay*, 97 Mo. 440; *Kern v. DeCastro, etc., Co.*, 125 N. Y. 50; *Strawbridge v. Bradford*, 128 Pa. St. 200; *Goldsmith v. Holland Building Company*, 182 Mo. 597; 81 S. W. Rep. 1112; *Seaver v. Bradley*, 179 Mass. 329; 60 N. E. Rep. 795; *Kennedy v. McAllaster*, 31 App. Div. 453; and authorities collated in 10 American and English Encyclopedia of Law, 944 *et seq.*

§ 4. **Passenger elevators.**— It is well settled that carriers of passengers by elevator are subject to the same rules of law as are other carriers of passengers. The purpose in each case is the mechanical transportation of the person of the passenger; the relations of both the carrier and the passenger are similar; and the same reasons exist for requiring of the carrier the utmost human care for the personal safety of the passenger (*Goodsell v. Taylor*, 41 Minn.

207; 42 N. W. Rep. 873; McDonough v. Lanpher, 55 Minn. 503; 57 N. W. Rep. 152; 43 Am. St. Rep. 541; Luckel v. Century Building Co., 177 Mo. 608; 76 S. W. Rep. 1035; Wise v. Ackerman, 76 Md. 375; 25 At. Rep. 424; Springer v. Schultz, 105 Ill. App. 544; affirmed 205 Ill. 144; 68 N. E. Rep. 753; Field v. French, 80 Ill. App. 79; Gibson v. International Trust Co., 177 Mass. 100; 58 N. E. Rep. 278; Western Union Telegraph Co. v. Woods, 88 Ill. App. 375; Riland v. Hirshler, 7 Pa. Super. Ct. 384; Beidler v. Bradshaw, 200 Ill. 425; 65 N. E. Rep. 1086; Hutchinson on Carriers (2d ed.), § 81d.; Lawson on Bailments, § 329; and the authorities cited in the other sections of this chapter.

**§ 5. Passenger elevators — Treadwell v. Whittier.** — The leading case on the subject is that of Treadwell v. Whittier (80 Cal. 595; 5 L. R. A. 498; 6 Rail. & Corp. L. J. 505; 13 Am. St. Rep. 175; 22 Pac. Rep. 266), in which the learned court expounds the specific reasons upon which the decision is based as follows: "The defendants used their elevator in lifting persons vertically to the height of forty feet. That they were carriers of passengers and should be treated as such, we have no doubt. The responsibility as to care and diligence rested on them as on the carriers of passengers by stage-



coach or railway. \* \* \* Persons who are lifted by elevators are subjected to great risks of life and limb. They are hoisted vertically, and are unable, in the case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, so far as human care and foresight will go."

§ 6. **Passenger elevators — Hartford Deposit Company v. Sollitt.** — In delivering the opinion of the court in this case (172 Ill. 225), Phillips, C. J., clearly stated the following fundamental rules of liability: "Persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings. It is a duty of such carriers of passengers to use extraordinary care in and about the operation of such elevators, so as to prevent injury to persons therein. The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed, and the instruction in this case, in alleging that the plaintiff was on the elevator for the purpose of being carried from one floor to another, and that the elevator, owing to its negligent and faulty

construction or to the negligence and carelessness on the part of the servants in operating the same, fell and caused an injury to the plaintiff, stated a correct proposition of law and stated a liability for causes alleged by the counts of this declaration.”

**§ 7. Passenger elevators — Degree of care.—**

There is no employment where the law demands a higher degree of care and diligence than in the construction and operation of passenger elevators. Their operation is necessarily to some extent dangerous. The control of the operator is absolute and the passenger is helpless as far as self-preservation is concerned. Powerful agencies of locomotion are employed while often the speed of travel is swift and the height attained is perilous. Therefore, the highest degree of human care and foresight is required of those engaged in either the construction or operation of passenger elevators and they are responsible for the slightest negligence (*Goodsell v. Taylor*, 41 Minn. 209; 42 N. W. Rep. 873; *Tousey v. Roberts*, 114 N. Y. 312; 21 N. E. Rep. 399; *Lee v. Knapp & Co.*, 55 Mo. App. 390; 137 Mo. 385; 155 Mo. 610; 56 S. W. Rep. 458; *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Luckel v. Century Building Co.*, 177 Mo. 608; 76 S. W. Rep. 1035; *Field v. French*, 80 Ill. App. 79; *Wilson v. Williams*, 22 Ky.

Law, 567; 58 S. W. Rep. 444; Frolich v. Cranker, 21 Ohio Cir. Ct. Rep. 615; 11 O. C. D. 592; Lafflin v. Buffalo, etc., R. Co., 106 N. Y. 136; 12 N. E. Rep. 599; Eagan v. Berkshire Apartment Assoc., 31 N. Y. St. Rep. 545; 10 N. Y. Sup. 116; McGrell v. Buffalo, etc., Co., 153 N. Y. 265; 45 Cent. L. J. 133; 47 N. E. Rep. 305; State v. Churchill, 15 Misc. Rep. 80; 36 N. Y. Sup. 476; 71 N. Y. St. Rep. 441; Hensler v. Stix (Mo. App.), 88 S. W. Rep. 108. But see Hubener v. Heide, 70 N. Y. Sup. 1115; 62 App. Div. 368; Ray on Neg., p. 308. At the same time a carrier of passengers by elevator is not an insurer of the personal safety of those carried. He has discharged his duty to passengers when he has exercised the highest degree of care ordinarily required in such cases (Bourgo v. White, 159 Mass. 126; 34 N. E. Rep. 191; Burgess v. Stowe, 134 Mich. 204; 96 N. W. Rep. 29; 10 Det. Leg. N. 434. See *post*, §§ 51, 97). In the case of Mitchell v. Marker (62 Fed. Rep. 139) the court tersely said: "Care short of the highest care becomes, not ordinary care, but absolute negligence." In other words when he has employed the highest degree of care and skill usually exercised by prudent persons in the same business (Kentucky Hotel Co. v. Camp (Ky.), 30 S. W. Rep. 1010).

In Oberndorfer v. Pabst (100 Wis. 505; 76 N.

W. Rep. 338) the court defined the duties of the proprietor of an office building, as follows: "It was the duty of the defendant \* \* \* to see that the steam elevators therein provided for access to and exit from its several floors or rooms were properly and safely constructed and operated with the highest degree of skill and care commensurate with or proportionate to the possibility of injury to the passengers in the use of such elevators. He was bound to employ men to operate them who would do all that human foresight and vigilance could do under the circumstances to protect and care for the safety of passengers, and, in view of the character and mode of conveyance adopted, reasonably to guard passengers who had entered or were about to enter the car from or against accident and consequent injury. This is a duty of which he could not discharge himself by delegating or turning it over to employees or operatives, however experienced or skillful. His liability was continuous until his duty was performed, and the failure of the operator to use such care and skill would be the failure of the proprietor himself, and would constitute negligence for which the latter would be responsible."

It naturally follows that what constitutes the highest degree of care in one case will not be so in another. The inexperience of children, the infirmity of age, the inability of the lame, and

all the commonly-known physical weaknesses must be considered by those actually running passenger elevators; and the question of the proper observance of these facts is usually for the jury to determine (*Tousey v. Roberts*, 114 N. Y. 312; 21 N. E. Rep. 399).

**§ 8. Passenger Elevators — Degree of Care — *Springer v. Ford*.** — The authorities upon this subject are learnedly reviewed by the court in the case of *Springer v. Ford* (189 Ill. 430; 52 L. R. A. 930; 59 N. E. Rep. 953; affirming 88 App. 529), as follows: "The plaintiff was in the employ of the Kinsella Glass Company, a tenant of the defendant, occupying the sixth floor of an eight-story building of which the defendant is the owner, located on Canal street, in the city of Chicago. The building was equipped with a passenger and a freight elevator, both of which were operated and controlled by the defendant. The falling of the freight elevator while plaintiff, in the discharge of his duty, was a passenger thereon, caused the injury complained of.

"At the close of plaintiff's testimony, and again at the close of all the testimony, the defendant moved the court to instruct the jury to find the defendant not guilty, which the court declined to do, and the action of the court in that behalf has been assigned as error.

“The law is well settled that persons operating elevators in buildings for the purpose of carrying persons from one story to another are common carriers of passengers. \* \* \* The operators of such elevators, upon the grounds of public policy, are required to exercise the highest degree of care and diligence. The lives and safety of a large number of human beings are intrusted to their care, and the law requires them to use extraordinary diligence in and about the operation of such elevators to prevent injury to passengers being carried therein.”

§ 9. **Passenger Elevators — Degree of Care —**  
**Griffin v. Manice.**—In the case of *Griffin v. Manice* (166 N. Y. 188; 52 L. R. A. 992; 29 N. E. Rep. 925, reversing *s. c.* 62 N. Y. Sup. 364; 47 App. Div. 70), the facts here material were, that while descending in the elevator of an office building an officer of a corporation, which was a tenant, was killed by the falling of one of the counterweights of the elevator. Cullen, J., in delivering the opinion of the court, said: “The next exception of the appellant relates to the degree of care which the learned trial court instructed the jury the defendant was bound to exercise. The court charged: ‘As to the machinery and appliances by which an elevator is moved, and controlled in its ascent and descent, an owner is bound to use the utmost

care as to any defect which would be liable to occasion great danger or loss of life, and he is in that respect subject to the same rule that applies to a railroad company in regard to its roadbed, engine and other similar machinery. Now, the rule applicable to a railroad company as to its roadbed, engine and machinery is that they are bound to exercise the utmost care and diligence and are liable for the slightest neglect against which human prudence and foresight might have guarded.' This instruction is sustained by the decision of the Supreme Court of California in *Treadwell v. Whittier* (80 Cal. 574). In *McGrell v. Buffalo Office Building Co.* (153 N. Y. 265) the question was discussed by counsel, but not passed upon by the court in its disposition of the case. In determining the correctness of the rule of liability laid down by the trial court, the relation of the parties, which I think not controlling on the application of the maxim '*res ipsa loquitur*,' is of vital importance. Doubtless no distinction can be drawn between vertical transportation and horizontal transportation, or transportation along the surface of the earth. If the relationship between the parties and the character of the carrier are the same in both cases, there is no reason why the same measure of diligence should not be exacted in one case as in the other. But the defendant was not a common

carrier, and received no compensation, at least directly, for carrying persons from one floor to another. The right of any person to be carried in the elevator was based on the implied invitation to enter, which the defendant as owner of the property is deemed to have extended to all who might have business on the premises. To such persons the law imposed upon the occupant or owner the duty of seeing that the premises were in a reasonably safe condition for access and entering (2 Shearman & Redfield, 704; *Beck v. Carter*, 68 N. Y. 283); but 'the measure of his duty was reasonable prudence and care.' (*Larkin v. O'Neill*, 119 N. Y. 221; *Hart v. Grennell*, 122 N. Y. 371).

"If the charge of the trial court is sustained, we must hold that the maintenance and operation of an elevator form an exception to the general standard of care imposed by the law upon the owners and occupants of real property. We see no reason for making this exception. The operation of an elevator, no doubt, involves danger, and if accident occurs it may result in most serious consequences. It is not, however, the only dangerous appliance used in modern buildings. The boiler which furnishes steam heat, the conductors through which electric light is furnished, may at times be the cause of serious accidents. An open hatchway is equally dangerous. Yet, it has never been



attempted to impose upon the owner of a building any greater responsibility as to these matters than that of exercising reasonable care.

“ It is very probable that, in the advance of mechanical arts, many new appliances will be introduced into buildings, which will involve danger. It seems to me impracticable to distinguish as to the measure of the owner's duty between these appliances, and that such an attempt would involve great confusion in the law. I do not wish to be misunderstood. In the exercise of the same degree of care, different degrees of precaution may be necessary. The same man with equal prudence will leave an article of furniture unguarded in his house and carefully secrete or lock up jewelry or money. So, the more dangerous an appliance may be, the more attention may be requisite. If the fair purport of the charge of the court was only that the care should be commensurate with the danger, it might not be objectionable. The charge, however, goes far beyond this. The utmost human care and foresight would require the owner of a building to use the most modern and improved form of elevator, the latest successful mechanical device and the most skillful operators. Such is the rule in the operation of railroads, and this degree of diligence may well be required where, for a consideration, there is a contract to carry safely.

But common knowledge informs us that such a rule would be unreasonable applied to elevators in ordinary buildings. There are elevators not only in great office buildings and hotels, but also in small buildings, and even in many private houses. Where there is little traffic the duty of operating the elevator is at times imposed on an employee or servant with other work to perform. To require all these cases (and I do not see how it is possible to distinguish between them on the law) the same measure of duty that is imposed on a railroad company or common carrier would be going too far. I think sufficient security is afforded the public when owners or occupants of a building are required to use reasonable care in the character of the appliance they provide and in its maintenance and operation. The stairways are always open to those who deem this degree of diligence inadequate for their protection. The charge of the learned trial court was, therefore, erroneous."

§ 10. **Foundation of rule.** — "The foundation of the rule for the protection of a passenger is the undertaking of the common carrier, which is to carry safely; but another reason for it is, that when the passenger commits himself to the carrier he does so in ignorance of the machinery and the appliances, as well as their defects, used

in connection with the means of transportation, and becomes a passive and helpless creature in the hands of the transportation company and its agents." (Fox v. Philadelphia, 208 Pa. St. 127; 65 L. R. A. 214.)

In 10 American and English Encyclopedia of Law, 946, the editor states some material points of law which are well founded although not judicially determined in proceedings directly relative to them.

"The proprietor of an elevator run for the use of the tenants of an office building and their visitors is a carrier of passengers for hire. The proprietor's compensation is the rental paid him by the tenant, for which he undertakes to carry him and his visitors by elevators. The same thing is true with reference to the proprietor or operator of an elevator in a hotel or apartment house. The proprietor of an elevator operated in his store for the benefit of customers or prospective customers is a carrier of those who may thus enter his elevator on his inducement or invitation implied or expressed." (See Springer v. Ford, 189 Ill. 430; 52 L. R. A. 930; 59 N. E. Rep. 953, affirming 88 Ill. App. 529.)

§ 11. **Freight elevators.** — There have been no decisions of the courts establishing that freight elevators may be common carriers of goods with all the rights and liabilities arising out of such

employment, but upon principle this is the law and will be so declared when the questions incident to the relations come up in the courts for adjudication. As a matter of fact probably all freight elevators now in operation are private carriers and assume none of the duties of common carriers. Hence, the courts have only occasionally passed upon the questions growing out of the relation of owners of freight elevators, as dangerous machines, to their employees, and to trespassers and licensees, as hereafter discussed (see *post*, CHAPTERS III, IV).

In the case of *Seaver v. Bradley* (179 Mass. 329; 60 N. E. Rep. 795), Holmes, C. J., says: "The modern liability of common carriers of goods is a resultant of the two long accepted doctrines that bailees were answerable for the loss of goods in their charge, although happening without their fault, unless it was due to the public enemy, and that those exercising a common calling were bound to exercise it on demand and to show skill in their calling. Both doctrines have disappeared, although they have left this hybrid descendant. The law of common carriers of passengers, so far as peculiar to them, is a brother of the half blood. It also goes back to the old principles concerning common callings. Carriers not exercising a common calling as such are not common carriers whatever their liabilities may be."

**§ 12. Freight elevators — Degree of care.—**

In discussing the degree of care required in the operation of elevators Judge Marshall of the Supreme Court of Missouri, in delivering the opinion of the court in the case of *Goldsmith v. Holland Building Company* (182 Mo. 597; 81 S. W. Rep. 1112), said: "There is a distinction in the books between the liability of a common carrier in respect to the carriage of goods and of passengers. As to the former the old rule was that the carrier was liable unless the injury to the goods resulted from the act of God or of the public enemy, while as to the latter, the carrier was liable only in the event he was guilty of some negligence. [5 Am. & Eng. Ency. Law (2 Ed.), p. 480; Hutchinson on Carriers (2 Ed.), sec. 495 *et seq.*] But Hutchinson points out in section 499, that the tendency of the modern decisions is to relax the rigor of the rule as to the carriage of goods and to make the rule as to the carriage of passengers more rigid."

There is no legal obligation to place safety clutches and other such appliances on elevators intended to carry freight only. (*Hale v. Murdock*, 114 Mich. 233; 72 N. W. Rep. 150. See *post*, §§ 48-51.)

**§ 13. Cannot limit liability.—** In accordance with the well established rule that a common

carrier cannot limit his liability for negligence, it has been judicially held that an injured employee of a lessee of a building is not deprived of his right to sue by a provision in the lease that the owner of the building shall not be liable for failure to keep the elevator in repair. *Springer v. Ford*, 189 Ill. 430; 52 L. R. A. 930; 59 N. E. Rep. 953; affirming 88 Ill. App. 529. S. P., *Griffin v. Manice*, 166 N. Y. 188; 52 L. R. A. 992; 29 N. E. Rep. 925; reversing *s. c.* 62 N. Y. Sup. 364; 47 App. Div. 70. See *Siegel, Cooper & Co. v. Norton*, 209 Ill. 201; 70 N. E. Rep. 636; and see *post*, § 23.

§ 14. **Grain elevators.**—For the reason that grain elevators are more of the nature of bailees than of carriers, the law regulating their construction and operation cannot be consistently treated in this text-book, any further than the few cases which will be found under appropriate headings wherein questions arise concerning their operation in actual contravention of the laws of gravity.

## CHAPTER II.

### CONSTRUCTION.

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§ 15. **Care in construction.** — In the construction and maintenance of elevators the utmost prudence must be exercised to secure the safety of employees and passengers (*Goodsell v. Taylor*, 41 Minn. 209; 42 N. W. Rep. 873; *Young v. Mason Stable Co.*, 89 N. Y. Sup. 349; 96 App. Div. 305; *Continental Tobacco Co. v. Knoof*, 24 Ky. Law Rep. 1268; 71 S. W. Rep. 3; *Moran v. Harris*, 63 Iowa, 390; *Carter v. Piano Co. (Mass.)*, 58 N. E. Rep. 478; *Mulvey v. R. I. Locomotive Works*, 14 R. I. 204; *Pantz v. Plankinton Packing Co.*, 118 Wis. 47; 94 N. W. Rep. 654; *Indianapolis, etc., Coal Co. v. Buffey*, 28 Ind. App. 108; 62 N. E. Rep. 279; *Pardridge v. Gillbride*, 98 Ill. App. 134; *Kennedy v. Alden Coal Co.*, 200 Pa. St. 1; 49 Atl. Rep. 341; *Wells v. Bourdages*, 88 Ill. App. 473; *Anderson v. Hayes*, 101 Wis. 520; 77 N. W. Rep. 903; *Oberndorfer v. Pabst*, 100 Wis. 505; 76 N. W. Rep. 338; *Tisch v. Hirsch*, 53 N. Y. Sup. 926; 34 App. Div. 623; *Ambrose v. Angus*, 61 Ill. App. 304; *Ashley Wire Co. v. Mercier*, 68 Ill. App. 485; *Tangcy v. Wilson*, 87 Mich. 453; *Montgomery v. Bloomingtondale*, 54 N. Y. Sup. 329; 34 App. Div. 375; *McDonough v. Lanpher*, 56 Minn. 503; 57 N. W. Rep. 152; 43 Am. St. Rep. 541; *Whallon v. Sprague Electric Elevator Company*, 37 N. Y. Sup. 174; 1 App. Div. 264; 72 N. Y. St. Rep. 519; *Moylan v. D. S. McDonald*

Co. (Mass.), 74 N. C. Rep. 929; and Harris' Damages by Corporations, 1136; Bailey on Master's Liability for Injuries to Servants, 2, 13 *et seq.*) This duty cannot be delegated to a co-employee so as to shield the master from liability. (Scandell v. Columbia Construction Co., 64 N. Y. Sup. 232; 50 App. Div. 512). Competent workmen must be employed and suitable materials used in the construction (McGonigle v. Kane, 20 Colo. 292; 38 Pac. Rep. 367; Connors v. Great Northern Elevator Co., 85 N. Y. Sup. 644; 90 App. Div. 311; Steinke v. Diamond Match Co., 87 Wis. 477; 58 N. W. Rep. 842; Kennedy v. McAllaster, 31 App. Div. 453; Zonger v. People's Union Merc. Co. (Mo. App.), 86 S. W. Rep. 487). But see Gittens v. William Porten Co., 90 Minn. 512; 97 Mo. 378.

The materials and workmanship of a hoisting derrick should be such as will stand the work for which it is intended (Dougherty v. Milliken, 49 N. Y. Sup. 905; 26 App. Div. 386. See Rincicotti v. John J. O'Brien Contracting Co. (Conn.), 60 Atl. Rep. 115; Boardman v. Brown, 44 Hun, 336; Boyle v. Columbian Fire Proofing Co., 182 Mass. 93; 64 N. E. Rep. 726.

A manufacturing company having in its employ a competent millwright is not negligent in having him to construct its freight elevator,

which on the first day it was operated fell and injured another employee. (*Sievers v. The Peters Box and Lumber Co.*, 151 Ind. 642; 50 N. E. Rep. 877).

Although the courts have not yet gone so far, the law should be that owners and operators of both passenger and freight elevators be required to obtain and use thereon the latest approved appliances for securing safety (*Mitchell v. Marker*, 62 Fed. Rep. 139). Recognizing the deficiency in the judge and jury made law, special statutes have been passed by the legislatures of a few of the States requiring the use of safety clutches, automatic doors and other appliances of an approved make, thereby adding to the safety of the employees, passengers and others (see Appendix). In determining whether the owner exercised due diligence in making the elevator reasonably safe, the usage of others is not the sole criterion, and it cannot be concluded that, as a matter of law, due diligence has been employed because the elevator is such as is ordinarily used for like purposes by reasonably prudent men (*Lee v. Knapp & Co.*, 55 Mo. App. 390; 155 Mo. 610; 56 S. W. Rep. 458; *McCormick Harvesting Machine Co. v. Burandt*, 136 Ill. 170; 26 N. E. Rep. 588).

But the fact that the appliances in question are such as are in common use may be shown in determining whether due care in their adoption

has been exercised (*Boess v. Clauson & Price Brewing Co.*, 42 N. Y. Sup. 848; 12 App. Div. 366. See *post*, § 65).

§ 16. **Care in construction — Instances.** — An elevator company is liable for a personal injury caused to an employee engaged in unloading a steam shovel furnished by it with a man to set it up, where a defective rope in the tackle breaks and directly causes the injury (*Connors v. Great Northern Elevator Company*, 85 N. Y. Sup. 644; 90 App. Div. 311).

So, there is negligence where an employee is injured by a derrick which was placed in an insecure position (*Dyas v. Southern Pacific Co.*, 140 Cal. 296; 93 Pac. Rep. 972; *Wagner v. New York, C. & St. L. R. Co.*, 86 N. Y. Sup. 921; 93 App. Div. 14; *Westbrook v. Crowdus*, (Tex. Civ. App.), 58 S. W. Rep. 195; *Scandell v. Columbia Construction Co.*, 64 N. Y. Sup. 232; 50 App. Div. 512). And where a guy rope on a derrick was placed in an improper place (*Consolidated Stone Co. v. Staggs* (Ind. App.), 71 N. E. Rep. 161); and where the ballast in a derrick was improperly changed (*Sherman v. Bishop*, 23 L. R. A. 26; 49 At. Rep. 39).

The owner of a derrick is not negligent in furnishing appliances which were new and not in general use but which were simple and effective

(Wagner v. New York, C. & St. L. R. Co., 78 N. Y. Sup. Rep. 696; 76 App. Div. 552).

Where the facts were in substance that a freight elevator cage was raised and lowered by a rope passing over a drum about an iron shaft and the whole made to revolve by an iron bevel gear on the shaft, and while the loaded cage was ascending the gear suddenly broke, the finding of a jury, which viewed the premises, that the elevator was defectively constructed, will be sustained (Lavigne v. Lewiston Mills Co., ( Me. ), 10 At. Rep. 62. . See Thompson v. Johnston, 86 Wis. 576).

In McKinnie v. Kilgallon (Pa. St.), 11 At. Rep. 614), the facts were that a hotel maintained two elevators, one for guests and another for freight and servants. A scrubbing girl in riding on the latter elevator from her work to her room was injured by her foot being caught between the floor of the elevator and the cornice of the door way leading to the office. A verdict for damages in her favor was warranted and the judgment sustained (see Olson v. Hanford Produce Co., 111 Iowa, 348; 82 N. W. Rep. 903).

In Delaney v. Hilton (50 N. Y. Super. Ct. 342), the evidence was that the plaintiff was employed by the defendants to run an elevator; that while he was running the empty elevator the chain by which it was held, broke, and the elevator, with

the plaintiff, fell into a cellar; that the chain and elevator were new and had been used but eight days; that the chain was what is known as a "three-eighths" chain; that elevators had been built and installed by reputable and experienced builders of elevators, and that the defendants' head-engineer in charge, stated both before and after the accident that the chain was not strong enough for the work of the house. It was held that it was error to direct a verdict for the defendants, and that the case should have gone to the jury.

In *Slattery v. Walker* (179 Mass. 307; 60 N. E. Rep. 782), it is held that where the superintendent of a hoisting machine negligently substituted a three-quarter inch check valve for the one-half inch check valve used in the original construction of the hoist, the proprietor is liable to an employee injured by the breaking of the check valve.

**§ 17. Care in construction — Trespassers and licensees.** — Even trespassers and bare licensees are entitled to protection against willful negligence in either the construction or the operation of elevators (*post*, Chapter IV). Although the ordinary rule of law is that in the absence of contractual relation or of privity between the manufacturer and a stranger, there is no liability for injuries either to person or property by

reason of defects that may exist in machinery or in mechanical contrivances or appliances, there is an exception where the machine or the mechanical appliance is in itself imminently dangerous (*Kahner v. Otis Elevator Co.*, 89 N. Y. Sup. 185; 96 App. Div. 169).

But in *Field v. French* (80 Ill. App. 79), it is held that a contractor erecting an elevator in a building occupied by a merchant, owes a duty to the merchant but not to his customers to properly construct the elevator. But there is no liability where the plaintiff is guilty of contributory negligence (*Kennedy v. Frederick*, 168 N. Y. 379; 61 N. E. Rep. 642; reversing *s. c.* 45 App. Div. 631. See *post*, §§ 123-129).

Where a freight elevator will not ascend to the top floor of the building in which it is operated, and an accident results from the loading of freight, the jury was justified in finding the construction to be defective and the owner liable (*Grifhahn v. Kreiger*, 70 N. Y. Sup. 973; 62 App. Div. 413).

**§ 18. Care in construction—Police and firemen.**—In denying a fireman who was the plaintiff in the case of *Hamilton v. Desk Manufacturing Co.* (78 Minn. 3; 6 Am. Neg. Rep. 595), the right to recover damages for injuries sustained while in the discharge of his duty in the defendant's building, the court said:

“By the rules of the common law, a fireman going upon the premises of another, under the circumstances appearing in this record, could not recover damages for such an injury. However hard such a rule may seem, it appears to be settled that the owner or occupant of a building owed no duty to keep it in a reasonably safe condition for members of a public fire department who might, in the exercise of their duties, have occasion to enter the building.”

In *Beehler v. Daniels* (19 R. I. 49; 31 At. Rep. 582) the facts in brief were that the owners of the building were taxpayers. In an action by the fireman against the owners of the building for the injury sustained the declaration alleged these facts and averred that the plaintiff was bound to respond to a fire call and to enter the defendants' premises in putting out fire, and so was invited by the defendants to enter. On demurrer to the declaration, it was *held*, that the facts did not raise an implication that the plaintiff entered the building on the invitation of the defendants.

There is no individual employment or responsibility in respect to public officers or servants on the part of taxpayers, and so no basis for an implication of service and invitation to enter their buildings.

In *Kelly v. Henry Muhs Co.* (N. J.), 59 At. Rep. 23) the court said: “In an action based



upon neglect of duty, it is not enough for the plaintiff to show that the defendant neglected to perform a duty imposed by statute for the benefit of a third person, and that he would not have been injured if the duty had been performed. He must show that the duty was imposed for his benefit, or was one which the defendant owed to him for his protection." Citing *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3; 80 N. W. Rep. 693; 79 Am. St. Rep. 350 (*S. P. Eckes v. Stetler*, 90 N. Y. Sup. Rep. 474; 98 App. Div. 76).

**§ 19. Care in Construction—Police and Firemen — Continued.**—By Massachusetts laws of 1872, chapter 260, section 5, it is provided that "In any store or building in Boston in which there shall exist or be placed any hoistway, elevator or well-hole, the openings thereof through and upon each floor" shall be protected by railings and trap doors. In *Parker v. Barnard* (135 Mass. 116; 46 Am. Rep. 450), the plaintiff, a police officer of the city of Boston, in the discharge of his duties crossed the threshold of the elevator entrance of a building, of which the defendants were the owners or occupants, and fell down the unguarded elevator well and was injured. It was held that he was entitled to maintain an action against the owners or occu-

pants of the building, although the statute imposes a penalty for its violation.

Among other things, the court said: "The owner or occupant of land is not liable at common law, for obstructions, pitfalls, or other dangers there existing, as, in the absence of an inducement or invitation to others to enter, he may use his property as he pleases. But he holds his property 'subject to such reasonable control and regulation of the mode of keeping and use as the Legislature under the police power vested in them by the Constitution of the Commonwealth may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare.' *Blair v. Forehand*, 100 Mass. 136. When, therefore, in the construction or management of a building, the Legislature sees fit to direct by statute that certain precautions shall be taken, or certain guards against danger provided, his unrestricted use of his property is rightfully controlled, and those who enter into the performance of a lawful duty, and are injured by the neglect of the party responsible, have just ground of action against him. Were the case at bar that of a fireman who, for the purpose of saving the property in the store, or for the prevention of the spread of fire to other buildings, lawfully entered in the performance of his duties, and who was injured because there was

no railing and trap-doors guarding the elevator well, he would have just ground of complaint that the protection which the statute had made it the duty of the owners or occupants to provide had not been afforded him" \* \* \* The fact that there was a penalty imposed by the statute for neglect of duty in regard to the railing and protection of the elevator well does not exonerate those responsible therefor from such liability \* \* \* As a general rule, where an act is enjoined or forbidden under a statutory penalty, and the failure to do the act enjoined or the doing of the act forbidden has contributed to an injury, the party thus in default is liable therefor to the party injured, notwithstanding he may also be subject to a penalty. *Kidder v. Dunstable*, 11 Gray, 342. *Salisbury v. Herchenroder*, 106 Mass. 458. *Hyde Park v. Gay*, *ubi supra*, 120 Mass. 589."

§ 20. Care in construction — Police and firemen — Judge Thompson's opinion. — The human kindness of the lamented late Judge Seymour D. Thompson is evidenced by his views expressed upon this subject in his Commentaries on the Law of Negligence, § 1076, where he says: "It is to be regretted that judicial theory has extended this rule so as to put the *fire patrols*, employed by insurance companies to enter buildings and save property on the breaking out of

fire, in the category of bare licensees, so that if one of them so entering falls into an unguarded elevator well this creates no liability on the part of the owner of the building, either at common law or under an ordinance relating to the safety of elevators in factories, work-shops, and other places where machinery is employed; and this is so although the board of underwriters providing such fire patrol, and clothing them with such duties, act under the authorization of a public statute (citing *Gibson v. Leonard*, 143 Ill. 182; *s. c.* 32 N. E. Rep. 182; 17 L. R. A. 588). A theory of this decision is that although such persons have an implied license to enter buildings, which have taken fire, to save property, under the principles of the common law (*Proctor v. Adams*, 113 Mass. 376), — yet this license carries with it no duty on the part of the owner of the building to provide in any special manner for the safety of such licensees (*Gibson v. Leonard*, 143 Ill. 182; *s. c.* 32 N. E. Rep. 182; 17 L. R. A. 588.”)

§ 21. **Proof of prudence.** — In *Goodsell v. Taylor* (41 Minn. 207; 42 N. W. Rep. 873), where the plaintiff was suing for damages on account of an injury caused by the breaking of the cable in the defendant's elevator, one of the defendant's witnesses was asked the question “whether or not there is anything in the con-

struction of the elevator, and in the appearance of the cable, that would suggest to a prudent man the necessity for having an examination of this cable at the point where it was pointed out to you as where this break occurred." The plaintiff objected to this question as incompetent, and as calling for an opinion and it was excluded. The court, in reviewing these proceedings in the lower court, said: "The question to what extent the apparent wear impaired the strength of the cable might have been one for an expert, but as held in *Mantel v. Chicago, etc., Ry. Co.*, 33 Minn. 62; 21 N. W. Rep. 853, whether due care requires this or that to be done is not a question for expert testimony. Whether prudence required an examination of the cable was for the jury to determine upon the facts and circumstances of the case."

§ 22. **Proximate cause.** — To maintain an action for an injury caused by the defective construction of an elevator it must be proved that the defect complained of was the proximate cause of the injury (*Gibson v. Leonard*, 143 Ill. 182; 32 N. E. Rep. 182; *Consolidated Stone Co. v. Staggs* (Ind. App.), 71 N. E. Rep. 161; *Dyas v. Southern Pacific Co.*, 140 Cal. 296; 73 Pac. Rep. 972; *Rosenbaum v. Shoffner*, 98 Tenn. 624; 40 S. W. Rep. 1086; *Malloy v. New York Real Estate Association*,

156 N. Y. 205; 56 N. E. Rep. 853; 41 L. R. A. 487, reversing *s. c.* 13 Misc. Rep. 496; *Stephens v. Stevens*, 21 N. Y. Sup. 721; affirmed, 66 Hun, 634; *Middendorf v. Schulze*, 105 Ill. App. 221; *Adams v. Snow*, 106 Wis. 152; 81 N. W. Rep. 983; see §§ 84, 163, 168, 169). In *Claypool v. Wigmore* (Ind. App.), 71 N. E. Rep. 509), the plaintiff was injured by falling through an open elevator shaft in an office building. It was shown that although the elevator shaft was partially open when approached by the plaintiff, her companion opened the door and she walked into the open shaft and fell to the bottom below. The court said: "We recognize the rule that where an injury might reasonably be anticipated from the negligent act of a party notwithstanding the intervention of an independent agency, the act of such independent agency will not constitute defense for it will not be regarded as cutting off the line of causation and the party guilty of the original act of negligence will be held responsible." (See *Cullen v. Higgins* (Ill.), 74 N. E. Rep. 698; *McGregor v. Reid*, 178 Ill. 464; 6 Am. Neg. Rep. 28; 53 N. E. Rep. 323, reversing 76 Ill. App. 610.

Thus in a case where an injury was caused by the negligence of a fellow-servant that will be deemed the proximate cause although the machinery and construction may have been de-

fective (*Luman v. Golden Ancient Channel Mining Co.*, 140 Cal. 700; 74 Pac. Rep. 307).

But where a defect in construction is shown to be one of the causes of an injury, a finding by a jury based upon another cause, also immediate, will not be disturbed (*Scandell v. Columbia Construction Company*, 64 N. Y. Sup. 232; 50 App. Div. 512. See *Jacobson v. Smith*, 123 Iowa, 263; 98 N. W. Rep. 773). In a case where it appeared that several months before the injury a piece of the elevator machinery had dropped, and that although the elevator had been in daily use since that time without any accident, it would at times get out of the grooves or guides unless heavily loaded. The accident was the result of the unexplained breaking of a clamp to which the ropes holding the elevator were attached. It was held that the plaintiff was properly nonsuited (*Lawson v. Merrall*, 69 Hun, 278; 23 N. Y. S. Rep. 560).

**§ 23. Employing competent contractor does not excuse negligence.** — The employment of a person to build an elevator when such person is notoriously incompetent to undertake such a work, is a fact admissible in proof of the owner's want of care. On the other hand the employment of a competent contractor is a fact indicating that the owner exercised due care in the construction of the elevator. But this is

not conclusive, for if there be proof that the contractor although competent was negligent in the performance of the work which was accepted and used by the owner, the owner is responsible for any consequential injury. This responsibility rests upon the theory that the contractor is the owner's agent and that the obligation of care and foresight cannot be shifted where such relations exist (*Treadwell v. Whittier*, 80 Cal. 595; 5 L. R. A. 498. See *Burns v. Sennett & Miller*, 99 Cal. 363; *McGregor v. Reid*, 178 Ill. 464; 6 Am. Neg. Rep. 28; 53 N. E. Rep. 323; reversing 76 Ill. App. 610; *Goggin v. Osborne*, 115 Cal. 437; *Hegeman v. Western R. Corp.*, 13 N. Y. 26; 16 Barb. 356; *Sharp v. Grey*, 9 Bing. 457) *Hubenir v. Heide*, 73 App. Div. 200. And see *Thompson on Neg.*, § 3897, citing *Bartley v. Trorlicht*, 49 Mo. App. 214).

In *Francis v. Cockrell* (L. R. 5 Q. B. 184), *Hannen, J.*, said upon this point: "If the carrier has contracted with someone else, the passenger does not usually know who that person is, and in no case has he any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge, and over which he can have no control, while the carrier may introduce what stipulations and take what sureties he may think proper. For injury resulting to the car-



rier himself by the manufacturer's want of care the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of contract with the carrier.

"Unless, therefore, the presumed intention of the parties be that the passenger should in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without remedy, the only way in which effect can be given to a different intention is by supposing that the carrier is to be responsible to the passenger, and look for his indemnity to the person whom he selected, and whose breach of contract has caused the mischief."

**§ 24. Builder liable to employee of owner, when.**—In *Necker v. Harvey* (49 Mich. 517) the facts were, in brief, that A. undertook to build for B. an elevator of a specified capacity. The elevator was erected, but did not work well, whereupon A. to attend to it sent a workman who ordered B.'s employees to load it. In obeying this order one of the employees was injured by a defect in the elevator. It was decided that he could maintain an action against A. for his injury. In delivering the opinion, the court said: "When a manufacturer is in possession and is testing his own machinery he

owes to everyone who may be in danger from it the duty of proper care; and if he exposes any one to danger from his carelessness,— whether the carelessness be in handling or in construction — he must answer for the consequences. The duty of care under such circumstances is not a contract duty, but a duty imposed by the common law; and the contract is only important as it evidences the degree of care which the defendant was bound to observe. \* \* \* If the accident had occurred on the day the elevator was set up, and before it had been turned over to the purchaser for use, there would have been no doubt of the defendant's liability; but if he comes back afterwards because of discovered defects, and took charge for the purpose of removing them, the ground of liability would be the same."

The fact that a contractor arranged with the owner of a building for the safety of the former's servants does not excuse him from liability for their injuries received in the work (Siegel, Cooper & Co. v. Norton, 209 Ill. 201; 70 N. E. Rep. 636).

**§ 25. Builder not liable to employee of owner, when.**— A very different case is that of *Ziemann v. Kieckheffer Elevator Mfg. Co.* (90 Wis. 497; 63 N. W. Rep. 1021), where it was held, that one who under a contract places a

freight elevator in the building of another upon condition that the elevator is to be operated by the latter on trial, under the supervision and control of the former, but not to be accepted and paid for until in good and complete running order, will not be liable to an employee of the latter for an injury caused by a defect in the construction of the elevator. The court said: "The contract and its performance on the part of the elevator company did not create any privity or contract relations between it and the plaintiff, as an employee of the Reliance Wire & Iron Works, who had nothing to do with the operation or use of the elevator, and was not attempting to operate or use it at the time of the accident. It is impossible to say, we think, that the elevator company stood in any relations to the plaintiff by reason of which it owed him any special duty, and equally so to hold that it invited him, impliedly or otherwise, to approach the elevator, or to come and be at work near the boot of the elevator shaft."

**§ 26. Contractor and not owner, liable.** — As above seen (*ante*, § 23), if the relation of principal and agent or master and servant exists between the owner of the premises and a contractor who is building or running an elevator thereon, in which event the servants of the contractor become the servants of the owner and

render him responsible for their negligent acts. But this relation may not exist. The contractor may be what is frequently called an "independent contractor" over whose work and conduct the owner of the premises has absolutely no authority or control. In this case the contractor only is liable for his own negligence and that of his servants. Such were the facts in *Barrett v. Singer Mfg. Co.* (1 Sweeney (N. Y.), 545), in which case the statement shows that the plaintiff's husband was killed by the falling of an elevator, which was, at the time of the accident, possessed and operated by or for the defendant's contractor. The defendant had no control over the operation of the elevator but merely gave the use of it to the contractor and supplied the power. It was held that the defendant was not responsible for the death (see *Ferris v. Aldrich*, 19 N. Y. Sup. 353; 47 N. Y. St. R. 40; *Mills v. Thomas Elevator Co.*, 66 N. Y. Sup. 398; 54 App. Div. 124; 8 Am. Neg. Rep. 655, following *Murray v. Dwight*, 161 N. Y. 301, 304; 55 N. E. Rep. 901; *Appel v. Eaton & Prince Co.*, 97 Mo. App. 428; 71 S. W. Rep. 741; *Diehl v. Robinson*, 76 N. Y. Sup. 252 *Durell v. Hartwell*, 26 R. I. 125; 58 At. Rep. 448; *Reilly v. Shannon*, 180 Pa. St. 53; 2 Am. Neg. Rep. 66).

§ 27. **Servant of independent contractor.** — Where the servant of one independent con-

tractor is found dead at the bottom of an elevator shaft used but not required to be left guarded by another independent contractor in the construction of the building, it was held that the latter was not liable (*Thaney v. Friederick & Sons Co.*, 89 N. Y. Sup. 787; 44 Misc. Rep. 134. See *Appel v. Eaton & Prince Co.*, 97 Mo. App. 428; 71 S. W. Rep. 741; *Harmer v. Reed Apartment Co.*, 68 N. J. L. 332; 53 At. Rep. 402; *Diehl v. Robinson*, 76 N. Y. Sup. 252; *Conner v. Koch*, 71 N. Y. Sup. 836; 63 App. Div. 257; *Cunningham v. Bay State, etc., Leather Co.*, 93 N. Y. 481; *Ferris v. Aldrich*, 47 N. Y. St. Rep. 40; 19 N. Y. Sup. 353. And see *Mills v. Thomas Elevator Co.*, 66 N. Y. Sup. 398; 54 App. Div. 124; 8 Am. Neg. Rep. 655, following *Murray v. Dwight*, 161 N. Y. 301; 55 N. E. Rep. 901).

Where a marble cutter's helper employed by contractors for marble work in a building in course of construction is injured by the negligence of the engineer operating a bad hoister used to take marble to the different floors but owned by another contractor, it was held that neither the owner of the building nor the employer of the helper was liable to him for the injury (*Duffy v. Williams*, 75 N. Y. Sup. 600; 71 App. Div. 110).

§ 28. **Servant of independent contractor — Pioneer Fire Proof Construction Co. v. Hansen. —** In this case (69 Ill. App. 659), it appears that the George A. Fuller Company was engaged as general contractor in erecting a building and the appellant was employed by the Fuller Company to fill in the floors and partitions with fire-proof material, and to put on the roof. The appellee was an employee of the Fuller Company. The appellee, with another employee of the Fuller Company, was in charge of a hoist from an alley to the roof where the material was unloaded by means of a derrick. "The material was loaded onto a platform called a 'boat,' five feet wide by seven feet long; this 'boat' was then fastened to the rope of the derrick and hauled up until it was level with the roof; then the 'boom' or arm of the derrick, over the end of which the hoisting rope passed, was raised, thus swinging the boat in until over the spot where it was to be landed, when it was lowered and guided to its resting-place. This was done by the employees of the Fuller Company. The tile was then unloaded by laborers paid by the Fireproof Company. At this particular time the roof was partly on and the boat had to be pulled into a space left in the roof for a dormer window, the iron rafters slanting up on each side thereof. Running north and south on the floor and near the slope

of the roof was a six-inch steam pipe. When the loaded boat was hauled in through this hole in the roof, it was lowered and rested across this pipe. There was sufficient room where it could have been drawn in clear of this pipe. On the morning of February 25th, a boat load was landed above and rested across the steam pipe. Thereupon, the workmen began unloading the tile from the side nearest them, the inner side, and after a certain quantity of tile had been removed from the inner side, the boat tilted across the steam pipe and one or more of the tile slid off, striking the steep roof, and thence down into the alley. A piece of tile struck Hansen on the head. At the close of the evidence the court instructed the jury to find the defendant, George A. Fuller Co., not guilty. The case proceeded against the Pioneer Fireproof Construction Co., and the jury returned a verdict finding it guilty, and assessed the damages at \$5,000. Motion for a new trial was overruled and judgment was given on the verdict, from which judgment this appeal is taken."

In affirming the judgment the court said, upon this point: "Appellant had contracted to fireproof this building; it employed another corporation to raise the roof tile to the fourteenth story; when such tiles had been so elevated, its own servants unloaded them from

the boat in which they came up. Whether the Fuller Company had so surrounded the place of unloading that appellant could not unload without proceeding as it did, and thereby causing tiles to fall to the alley below, is immaterial. If it undertook to do a dangerous act it was bound to provide against injury thereby to the deceased whose employment required that he should work where he did."

**§ 29. Non-liability of master during transfer of control.** — Where the owner of a building lends the use of the elevator for a day to a company putting in fire extinguishers, the man operating the elevator becomes for the time being the servant of the company (*Conner v. Koch*, 71 N. Y. Sup. 836; 63 App. Div. 257).

In *Higgins v. Western Union Telegraph Co.* (156 N. Y. 75; 30 Chicago Leg. News, 326; 50 N. E. Rep. 500, reversing 11 Misc. Rep. 32), where a contractor undertakes to restore a building which had been damaged by fire and in doing so used the elevators and instead of employing one of his own men for the purpose of operating the elevators, found it more convenient and economical to procure a man who was in the employment of the owner of the building — the defendant. Although the elevators had not yet been turned over to the defendant, it was, nevertheless, permitted to



use them for the purpose of taking passengers up and down during some portions of the day.

In holding that a recovery against the owner was not warranted, the court said: "Beyond the scope of his employment the servant is as much a stranger to his master as any third person, and the act of the servant, not done in the execution of the service for which he is engaged, cannot be regarded as the act of the master. And if the servant step aside from his master's business, for however short time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant during such interval is not to be attributed to the master. The relation of master and servant between the conductor of the elevator and the defendant was suspended during the time that he was doing the work of the contractor in moving the plaintiff up and down the shaft." (See *O'Malley v. Twenty-Five Associates*, 170 Mass. 471; 49 N. E. Rep. 641.)

**§ 30. Owner's knowledge of defect.** — Where the owner of an elevator has used due care in the employment of a competent contractor and in the selection of his materials he is not liable for an injury caused by some latent defect or by a patent defect which he had not a reasonable opportunity to discover and repair (*Black v.*

Ontario Wheel Co., 19 Ontario Rep. 578; Malone v. Hawley, 46 Cal. 409; McGonigle v. Kane, 20 Colo. 292; 38 Pac. Rep. 367; Turnier v. Lathers, 36 N. Y. St. Rep. 821; Sellers v. Dempsey, 26 App. Div. (N. Y.) 22; Ford v. Crigler, 25 Ky. Law Rep. 56; 74 S. W. Rep. 661; Anderson v. Hayes, 101 Wis. 520; 77 N. W. Rep. 903; Bruce v. Beall, 99 Tenn. 303; 2 Chic. L. J. Wkly. 464; 41 S. W. Rep. 445; 9 Am. & Eng. R. R. Cas. (N. s.) 841; Auld v. Manhattan Life Insurance Co., 34 App. Div. 491, affirmed in 165 N. Y. 610; Sweeney v. Rozell, 64 N. Y. Sup. 721; 31 Misc. Rep. 640; Mulhern v. Coal Co., 161 Pa. St. 270; 28 Atl. Rep. 1087. See *post*, §§ 48-51.)

Thus in Robinson v. Wright (94 Mich. 283) the court, in passing upon this point, said: "The sudden breaking or giving way of a piece of machinery, properly constructed, is not sufficient to justify the conclusion of negligence. Machinery well constructed, and apparently safe, and having been tested by use, often gives way from some hidden or unknown defect."

In Bucher v. Pryibil (45 N. Y. Sup. 972; 19 App. Div. 126), it appeared that a hook supporting the check rope straightened out allowing the rope to fall and that the elevator had been inspected only about two weeks before

the accident. It was held that there was no evidence of the owner's negligence.

If the defect could have been discovered by the exercise of reasonable prudence on the part of the owner, lessee or operator and was not known to or could not have been avoided by the party injured by the exercise of common prudence, the latter may recover, of the former, damages for his injury (*Krey v. Schlussner*, 16 N. Y. Sup. Rep. 695. See *Bier v. Standard Mfg. Co.*, 130 Pa. St. 447; *Oriental Investment Co. v. Sline*, 17 Tex. Civ. App. 692; 41 S. W. Rep. 130). Where an ineffective attempt has been made by the owner to remedy the defect the question of care is for the jury to determine (*Blake v. Fox*, 43 N. Y. St. Rep. 527). So is the question whether a hidden defect in the machinery of an elevator could have been discovered by exercising diligence (*Field v. French*, 80 Ill. App. 79).

In the case of *Weiden v. Electric Light Company* (73 Mich. 268), it was held that where an electric company maintains towers with elevators therein on which line-men may ascend, it is liable for an injury to an employee caused by the breaking of a cable, the defective condition of which had been made known to the company's superintendent.

Notice of a defect in a cable in an elevator given to the foreman in charge of the con-

struction of a building is equivalent to notice to the contractors thereof (*Falkenau v. Abrahamson*, 66 Ill. App. 352).

**§ 31. Employee's knowledge of the defect.**— In a case where an employee was a frequent and almost the only user of an elevator of simple mechanism, he cannot recover damages for an injury, to a defective spring, because of the owner's failure to inspect the appliances (*Juchatz v. Michigan Alkali Company*, 120 Mich. 654; 79 N. W. Rep. 907; 6 Det. L. N. 297).

In *Kann v. Meyer* (88 Md. 547; 5 Am. Neg. Rep. 152; 41 At. Rep. 1065; citing *Donovan v. Gay*, 97 Mo. 440), where a machinist accepted employment to repair a freight elevator and was injured thereby, the question of the negligence of the owner, in failing to provide a safe place to work, was submitted to the jury.

Mere knowledge by an employee of a mine that his employer had not provided the mechanical protections against injury required by law will not defeat his suit to recover damages for an injury caused by such failure (*Durant v. Lexington Coal Mining Co.*, 97 Mo. 62; 10 S. W. Rep. 484).

Men employed in painting in elevator shaft who rest their scaffolding in the loops of ropes were guilty of contributory negligence (*Simp-*

son v. Gerken, 45 N. Y. Sup. 1100; 19 App. Div. 68. See Holmes v. Junod, 68 Fed. Rep. 858; 30 U. S. App. 379; 16 C. C. A. 36. And see *post*, §§ 116-127).

**§ 32. Landlord's Knowledge of Defect.** — It is the general duty of a landlord to keep the premises in a reasonably safe condition for the use of his tenants (*Wilcox v. Zane*, 167 Mass. 302; *Metzger v. Schultz*, 16 Ind. App. 454; *Burger v. Johnson*, 6 Ohio N. P. 252. See *post*, §§ 72-76, and Chapter IV.).

In the case of *Anderson v. Hayes* (110 Wis. 538; 5 Am. Neg. Rep. 504; 77 N. W. Rep. 891), the lessor of a factory knew of a dangerous latent defect in the elevator, but did not disclose this fact to the lessee. An employee of the lessee was injured and the lessor was held liable. In delivering the opinion of the court, Winslow, J., said: —

"The principle is well settled that a tenant takes leased premises in the condition in which they happen to be when leased, and that the landlord is not liable to the tenant for injuries resulting from lack of repairs unless he has contracted to repair, or unless the defect be a concealed one known to the landlord and not disclosed to the tenant and not discoverable by the use of that degree of care which the law demands, and it is equally well settled that an

employee, servant, or sub-tenant of the tenant has no greater rights as against the landlord than the tenant himself. *Cole v. McKey*, 66 Wis. 500. The rule is thus stated in *Cowen v. Sunderland*, 145 Mass. 363: "Where there are concealed defects attended with danger to the occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor if injury occurs." The rule is also recognized and stated in 2 *Wood, Landlord & T.*, § 381, and numerous cases are there cited in its support. (See *Stott v. Churchill*, 15 Misc. Rep. 80; *Malloy v. New York R. E. Assoc.*, 34 N. Y. Sup. 678; 13 Misc. Rep. 496; *Oberfelder v. Doran*, 26 Neb. 118; 41 N. W. Rep. 1094; *Hansen v. Schneider*, 58 Hun, 60; 33 N. Y. St. Rep. 811; *Frolich v. Cranker*, 21 Ohio C. C. 615; 11 Ohio C. D. 592; *Henson v. Beckwith*, 20 R. I. 165; 37 At. Rep. 702; 38 L. R. A. 716; 3 Am. Neg. Rep. 95).

In the case of *Olson v. Schultz* (67 Minn. 496), the material facts are that the appellant was the owner of a four story building, the fourth floor of which, with the privileges and

appurtenances thereunto belonging, was leased to the respondent. The lessor of the premises agreed according to the terms of the lease to keep the elevator in constant repair and in perfect condition, provided that if the premises should become untenable without the fault of the lessee, then the lessee should be released, etc. Respondent had equal right to use the elevator in common with other tenants; but when the necessities of each tenant required its use, he furnished his own operator.

It was held that such leasing would not exonerate the landlord from responsibility for the unsafe condition of the elevator. "Nor," as the court said, "was it necessary to show that the defendant had knowledge of the defect. His duty was of care, and ignorance of the defect was no defense." Citing *Lindsey v. Leighton*, 150 Mass. 285; 22 N. E. Rep. 901.

**§ 33. Failure of lessee to comply with statute.—**  
In the case of *Tvedt v. Wheeler* (70 Minn. 161; 72 N. W. Rep. 1062), the facts were in brief that the defendant was the owner of a warehouse which he equipped with a freight elevator, operated by water pressure, through an endless wire cable in an unprotected wheel hole. While the plaintiff was at work in the building for the lessee, he was injured by the cable, around which it was entirely practicable to have

a fence or guard in compliance with the statute (G. S. 1894, § 2250) requiring all such openings to be inclosed or otherwise protected. The court, in passing upon this point, said: "The question arising upon the facts in this case is whether the owner of the building, who, while the building is in his possession, neglects to comply with the statute, as to dangerous appliances which it is practicable to guard and which are a part of the building itself, who turns it over to his lessee with no fence or guard about such appliances, is liable to an employee of the lessee, who is injured by reason of the fact that no guard was ever placed around them by either the owner or the lessee.

"The purpose of the statute is plain. It was intended to guard human life and protect human bodies from being mangled. It is a police regulation founded upon sound public policy, and courts ought not to strain or restrict by construction its language so as to impair its useful operation. It should be construed so as to effectuate the wise and human purposes of its enactment. While the statute does not impose the duty of guarding such appliances upon the owner by name, its terms being positive and sweeping that such appliances shall be so guarded, yet there is no reason why the owner of a building should not be required to comply with the statute, as to such dangerous



appliances as are a part of his building, before he delivers the possession of the building to his lessee; and we so hold. The duty, in the first instance, rests upon the owner to construct guards about such appliances, even if it should be held that the continuous duty rests upon the lessee to keep them guarded while they are in his exclusive possession and control."

"Statutes of other States, somewhat similar to our own, have been construed as applicable to the owner, although the duty was not specifically imposed upon him. Thus, a Massachusetts statute (section 5, c. 260, St. 1872) provided in general terms without placing the duty upon any one in particular, that in any building in Boston in which there should be placed any hoisting elevator or well-hole, it should be protected by a railing. A police officer who entered such a building in the discharge of his duty and fell through an unguarded elevator well, brought an action against both the owners and the occupants of the building for his injuries so sustained. The trial court found for the defendants. The case was reversed on appeal, the Supreme Court holding that the defendants were liable under the statute. The court, however, did not consider the respective duties of the owners and occupants. *Parker v. Barnard*, 135 Mass. 116.

"A New York statute declared in general

terms that any building occupied, or built to be occupied as a manufactory, should be provided with a fire escape. This statute was considered in the case of *McLaughlin v. Armfield*, 58 Hun, 376, 12 N. Y. Supp. 164, which was an action by an employee of the occupant of a building built to be occupied as a factory against the owner thereof, on account of his neglect to equip the building with a fire escape, whereby the plaintiff was injured. The defendant claimed that because the statute did not, in terms, impose the duty upon the owners of such building it could not be placed upon them by a judicial construction of the law. The court, however, held that the initial duty rested upon the owner, and held him liable.

“In the case at bar the wheel hole included in the term ‘the pulley and cable’ was a part of the building itself, a necessary part of the elevator, and there was no reason why the defendant should not have complied with the statute before parting with the possession of the building to the lessee. The initial duty rested upon him to guard the wheel hole as required by law. He could not evade the duty by leasing the building. *House v. Metcalf*, 27 Conn. 631.” (See *Beehler v. Daniels*, 19 R. I. 49; *Henson v. Beckwith*, 20 R. I. 165; 2 Chic. L. J. Wkly. 399; 38 L. R. A. 716; 3 Am. Neg. Rep. 95; 37 Atl. Rep. 702).

§ 34. **Questions for the jury.** — In all cases except where the failure to exercise care is in violation of some statute (*post*, § 43), or willful, or such reckless disregard for the personal safety of others as to amount to negligence *per se*, the questions of fact arising in the case and the estimate of prudence are for the jury to determine (*Browne v. Siegel, Cooper & Co.*, 191 Ill. 226; 60 N. E. Rep. 815. affirming 90 Ill. App. 49; *Kempfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Shields v. Robins.* 38 N. Y. Sup. 216; 3 App. Div. 582). In accord with this general rule it was held proper for the case to go to the jury where the proof tended to show that the accident was due to the faulty construction of the machinery (*McGonigle v. Kane*, 20 Colo. 292; 38 Pac. Rep. 367; *Wilsey v. Jewett*, 122 Iowa, 315; 98 N. W. Rep. 114; *Nyback v. Champagne Lbr. Co.*, 109 Fed. Rep. 732; 48 C. C. A. 632); again, where the method of attaching the hoisting rope was defective and unsafe (*Malone v. Hawley*, 46 Cal. 409); and again, where a cable which had been used three or four years had worn some where it could have been seen if properly looked after (*Goodsell v. Taylor*, 41 Minn. 207; 42 N. W. Rep. 873. See *Swenson v. Metropolitan Street Railway Co.*, 80 N. Y. Sup. 281; 78 App. Div. 379; *Hartford Deposit Co. v. Pederson*, 67 Ill. App. 142).

So, in a case where carpenters constructing an elevator were using a staging furnished by the superintendent of the building and the staging fell, injuring the carpenters, the question of negligence in its construction was for the jury (*Bourbonnais v. West Roylston Mfg. Co.*, 184 Mass. 250; 68 N. E. Rep. 232). Where different inferences might be drawn from the evidence (*Auld v. Manhattan Life Insurance Company*, 54 N. Y. Sup. 222; 34 App. Div. 491), as whether it is practicable to so guard dangerous machinery that employees will not be injured, the question is for the jury (*Bair v. Heibel*, 103 Mo. App. 621; 77 S. W. Rep. 1017).

**§ 35. Unguarded elevator well in course of construction — Contributory negligence.** — While an elevator is in course of construction or of being repaired there are necessary dangers to which all persons coming within close proximity are exposed. The risk of all the dangers ordinarily incident to such employment is impliedly assumed by every employee and all other persons must use commensurate care to avoid such dangers by keeping out of their way. In *Headford v. The McClary Mfg. Co.* (23 Ontario Rep. 335; 24 Can. Sup. Ct. 295), the plaintiff in going to his work in the defendant's building had to pass through a long well-lighted room near a hoist upon which men were

at work. As a rule a bar protected the entrance to the hoist; but on this occasion the bar was removed on account of the repairs, and plaintiff in looking at a man at work on the hoist walked into the hole in the floor and fell to the cellar below, receiving the injury for which he sued. It was held that the action must be dismissed upon the ground of contributory negligence. The court said, in part: "The men were at work upon the hoist. The evidence is uncontradicted that it was impossible to guard the hole while the men were at work. The fact of the men working on the hoist was present to the plaintiff's mind because it was while observing them that he went into the hole. There is no evidence at all upon which it could be reasonably held that the hole was not guarded as far as it was practicable under the circumstances. Assume a case of a hole being cut in the floor for the purpose of putting in a hoist, and while the men were at work upon the hole a man looking at them should carelessly walk into it. Could it be said that such hole should have been securely guarded against him? It would be securely guarded as far as practicable. In other words, would it have been practicable to have guarded the hole while the men were at work cutting it out and placing in the hoist? Must not one keep away from such a place, or if he

go to it, take the risk of being there?" (See *Conway v. Furst*, 57 N. J. L. 645; 32 Atl. Rep. 380; *Reilly v. Shannon*, 180 Pa. St. 53; 2 Am. Neg. Rep. 66; *Jehle v. Ellicott Square Co.*, 31 App. Div. 336; 52 N. Y. Supp. 366; *Ingram v. Fosburgh*, 73 App. Div. 129; 76 N. Y. Supp. 344; *Chamber of Commerce Building Co. v. Klussman*, 25 Ohio Cir. Ct. Rep. 728.)

§ 36. **Unguarded elevator well, near street.** — At common law occupiers of land were entitled to make excavations therein even of a dangerous character and near to public highways. In all the States where this common-law rule has not been repealed by statute the builders of elevators with openings upon or near streets incur no liability to passers-by or trespassers who may turn in and receive injuries. Where this rule prevails, the occupier of land becomes responsible to another injured thereon only where that other has been either expressly or impliedly invited to enter (*Webb's Pollock on Torts*, p. 216; *Whittaker's Smith on Neg.* (2d ed.), p. 80). Thus, where one who is partially blind enters by mistake the vestibule of an elevator near the street and falls into the shaft, he was refused damages for his injury.

Again, where the backing of a horse upon the sidewalk of a city street pushed a passer-by into the shaft of an elevator maintained with an

opening about eighteen inches from the sidewalk and injured him, the operator of the elevator was held to be not liable. The court, in disposing of this question, said: "In this commonwealth the obligation of a city or town to put up guards against pitfalls which are so near to the highway as to make it unsafe for travelers, is similar to the obligation which it seems is imposed upon abutters by the English law. We are not aware that it has ever been decided here, that excavations made by the owner of land outside the limits of a highway, but so near to it as to make it unsafe for travelers, constitute a public nuisance, for the creating or maintaining of which a landowner may be punished; or that in assessing damages for land taken for a highway, any allowance is made to the landowner for the loss of any right to use the land not taken, in the same manner as if a highway had not been laid out." (McIntire v. Roberts, 149 Mass. 450; 4 L. R. A. 19. See Mauerman v. Siemerts, 71 Mo. 101; Burner v. Higman & Skinner Co. (Iowa), 103 N. W. Rep. 802; Kennedy v. McAllaster, 31 App. Div. 453; and see, *ante*, §§ 15-20; *post*, § 148.) But where the owners of a store, upon a public street, rent the upper floors to a tenant who is injured by falling into a trap-door carelessly left open directly in front of the stairs leading to

the upper floors, they are liable for the injury (*Elliott v. Pray*, 10 Allen (Mass.) 378; 87 Am. Dec. 653. See *Sanders v. Reister*, 1 Dak. 151; 46 N. W. Rep. 580; *Mullaney v. Spence*, 15 Abb. Pr. (N. S.) 319).

In *City of Pawtucket v. Bray* (20 R. I. 17; 2 Am. Neg. Rep. 71), the material facts were that the defendants were the proprietors of a store from the cellar of which they operated a freight elevator to the sidewalk in front. The elevator well was covered by an iron grating, opening from the center in two parts on hinges from the sides, at right angles from the front of the building. The only precaution taken was that in operating the elevator, the operators on it shouted "elevator" as they came up. A deaf woman, in passing along the sidewalk about dusk, stepped sidewise, fell into the opening and was injured. She brought suit against the city in which the injury occurred, and the defendants were notified to appear and defend it. The case was tried. The defendants did not appear. Judgment was obtained against the city, which was paid. This suit is for reimbursement by reason of the ultimate liability of the defendants.

Following the rule well established in such cases the city was held to be entitled to reimbursement.



§ 37. **Unguarded elevator — Wilson v. Williams.** — In this case (22 Ky. Law, 567; 58 S. W. Rep. 444); Burnam, J., in delivering the opinion of the court, stated the facts and conclusions of law here of illustrative value, as follows:—

“ Appellant sought in this proceeding to recover damages of appellee for injuries which she alleges were due to the negligent construction and operation of an elevator in the business house of appellee, on East Main street in Lexington, Ky. The appellee filed general demurrers, both to the original and amended petitions, which were sustained by the trial court, and the appellant declining to plead further her case was dismissed. Hence this appeal.

“ Appellant alleges, in substance, that she was seventeen years old; was in the employment of defendant in the operation of his steam laundry; that he had constructed an elevator for the purpose of conveying his employers and the clothes from the first floor to the upper floors of the building, and vice versa, and that the elevator had no boards on its sides so as to protect persons going from one floor to another from being struck by the side walls and floors by and through which said elevator ascended and descended; that it was her duty, as employee of the defend-

ant, to go from one floor to another on the elevator, and that while she was on said elevator going from the first to the second floor, by direction of defendant, she was, without fault on her part, and on account of the defective construction of the elevator in failing to have the sides thereof guarded in a careful manner, her foot was caught between the side wall and the floor and the elevator and crushed, and the bone broken so as to render her a cripple for life; that her injury was wholly due to the defective construction of the elevator, and that appellee knew of its danger, and of which she did not know.

“In the second paragraph she charges that the elevator was operated by an unskilled employee of appellee, and that her injury was due to carelessness and unskillfulness of this employee.

“It is the duty of a person operating a laundry which requires the use of an elevator by his servants and employees to exercise ordinary care in both its construction and operation, so as to render it free from danger to those having a right to use it as possible. And any failure in either respect renders him liable for injuries sustained by his employees by reason of such defective construction or operation. His employees have a right to presume that the elevator, which at best is a dangerous piece of

machinery, is properly constructed and managed.

“Whether the elevator complained of came up to these requirements or not is a question to be determined by a jury from the testimony before them. On the other hand, it is the duty of the employee to exercise that degree of care which a reasonably prudent person would use to avoid being injured. If appellant has failed to exercise this care she cannot recover from the injury to which her own negligence has contributed, even though her employer had failed to exercise due care on his part. Both questions are properly for the jury.

“For reasons indicated the judgment is reversed and the cause remanded, with instructions to overrule the demurrer and for proceedings consistent with this opinion.” (See *Haymarket Theater Co. v. Rosenberg*, 77 Ill. App. 184.)

**§ 38. Freight elevators not sheathed.** — Proper care in the construction of freight elevators does not require that they be wholly inclosed or sheathed, and this may be considered a general rule, although there may be exceptions.

The case of *Hoehmann v. Moss Engraving Co.* (23 N. Y. Sup. Rep. 787; 4 Misc. Rep. 160; see *McDonough v. Lanpher*, 55 Minn. 503; 57 N. W. Rep. 152; 53 Am. St. Rep. 541), was an action brought by an employee for injuries

received on a freight elevator in the defendant's business house. The elevator consisted of an open platform with a shaft of four posts from the cellar to the roof, and strengthened by cross-ties extending from one post to another, so that when the elevator passed there was only about one inch space between the platform and the cross-ties. While the plaintiff was riding on the elevator his foot was crushed between the platform and one of the cross-ties. It was held that the elevator was not improperly constructed.

But such an elevator would not be legally allowable for the purpose of carrying passengers (*McKinnie v. Kilgallon*, 11 Atl. Rep. 614).

Where a truckman delivering meat upon freight elevators fell through an unguarded space only about ten and a half inches wide and was injured, it was held that the finding of negligence in construction was not justified (*Gray v. Seigel-Cooper Co.*, 79 N. Y. Sup. 813; 8 App. Div. 118; see *Trask v. Shotwell*, 41 Minn. 66; 42 N. W. Rep. 679).

Freight elevators are not required to be equipped with all the safety appliances of passenger elevators (see *post*, § 48).

§ 39. **Movable slide.** — An elevator with a movable slide for the purpose of taking on baggage, is not, as a matter of law, improperly

constructed; and in a case where plaintiff's intestate either through faintness or loss of consciousness, sank to the floor while the elevator was ascending and fell through the slide which was open, it was held that the defendant was not liable (*Egan v. Berkshire Apartment Assoc.*, 10 N. Y. Sup. Rep. 116).

§ 40. **Sliding gates.** — As a matter of law it cannot be said that sliding gates three feet high adequately protect the openings in the shaft of a passenger elevator (*Guichard v. New*, 84 Hun, 54; 31 N. Y. Sup. 1080, reversing *s. c.* 65 N. Y. St. Rep. 20).

§ 41. **Railings.** — In the construction of passenger elevators the shafts or wells are usually safely inclosed. In some of the States special statutes require that they be made fire-proof (see Appendix). But freight elevators are generally so built that the holes in the floors through which the cars pass are guarded only by railings, sometimes by nothing.

So far as the safety of employees is concerned, there is no rule of the common law which requires railings or guards around elevator shafts (*Bair v. Heibel*, 103 Mo. App. 621; 77 S. W. Rep. 1017); but the rule is different towards persons who are lawfully entitled to become passengers upon elevators (see *Mullaney v.*

Spence, 15 Abb. Prac. 319; *Sunderlin v. Hol-  
lister*, 4 App. Div. 478; 38 N. Y. Sup. 682;  
*Nyback v. Champagne Lumber Company*, 109  
Fed. Rep. 732; 48 C. C. A. 632; *Dallemand v.  
Saalfeldt*, 175 Ill. 310; 51 N. E. Rep. 645; 17  
Nat. Corp. Rep. 439, affirming *s. c.* 73 Ill.  
App. 151; 15 Nat. Corp. Rep. 698; *Tisch v.  
Hirsch*, 32 App. Div. 635; 52 N. Y. Sup. 1076;  
34 App. Div. 623; 53 N. Y. Sup. 926; *Weiss  
v. Jenkins*, 39 App. Div. 567; *Hyde v. Mendel*,  
75 Conn. 140; 52 At. Rep. 744).

It has been held that the fact that others had failed to use such railing is no legal excuse for one's not using it, and that the matter is not such that only an expert could testify to it (*McCormick Harvesting Mach. Co. v. Burandt*, 136 Ill. 170; 26 N. E. Rep. 588).

In *Tisch v. Hirsch* (53 N. Y. Sup. 926; 34 App. Div. 623), an enclosive bar, which was loose at one end, was being lowered by a seven-teen-year-old employee who, while leaning against it, allowed the loose end to fall outside the hasp intended to receive and hold it, and consequently fell into the shaft of the elevator where he was injured. It was held that the form of construction was not negligent.

It is not error to admit evidence tending to show the cost of putting a guard around an elevator (*Tvedt v. Wheeler*, 70 Minn. 161; 72 N. W. Rep. 1062).

§ 42. Railings — **Rosenbaum v. Shoffner.** — The leading case on the subject of the duty to provide sufficient railings or guards around elevator shafts is that of *Rosenbaum v. Shoffner* (98 Tenn. 624; 40 S. W. Rep. 1086). In this case the facts were that the appellee's intestate entered a furniture store for the purpose of making some purchases, and, as Wilkes, J., states in delivering the opinion of the court: "was examining a base burner stove, and talking about its cost with a salesman or clerk. He was estimating the quantity of pipe that would be required to set it up, and, in doing so, walked back, and looked up at the wall to estimate the distance. The stove was upon a platform raised up from the floor some thirteen inches and was twenty-four inches wide, upon which it had been placed for exhibition, the western end of the platform coming up to the elevator opening, the north side of the platform being on a line with the south side of the elevator. Furniture was stored around the platform so that the stove could be examined only on the south and west sides. When deceased started to walk back, looking at the stove, he was about four feet from the elevator. He struck his foot against the edge of the platform and stumbled, and fell into the cellar. The elevator was not running at the time, and the platform was on the cellar or basement floor. The evidence is

that it was out of fix. There is quite a controversy as to how the elevator shaft was protected. Several witnesses state that the opening was protected by a guard rail. This guard rail is described by the principal witness of the defense, one of the defendant's employees, as an elm slat or rail  $\frac{7}{8}$  by  $3\frac{1}{2}$  inches. This witness says he procured the rail; that he did not select it; that it was all he had at the time, and he used it, and it was sufficient for what he wanted it for; that it was a slat that had been used in packing furniture, and might have been weather cracked; that a knot just where it broke might have weakened it some but not to any great extent. There is some discrepancy as to how this guard rail was placed, whether inside or outside of the opening. It was put on wooden cleats. There is testimony that one of these slats was broken by the fall of the deceased, and other testimony that neither one of them was broken. The testimony shows that the rail was some six to ten inches inside of the elevator and about three to four feet up from the floor. \* \* \* The question, on its merits, mainly turns upon the sufficiency or insufficiency of the guard rail or protection to the elevator, and whether there was such a guard rail. If the rail or protection had been strong enough to guard against reasonable contingencies and probabilities, then defendant ought not to have been held



liable, but, if there was no guard rail, or one so manifestly defective as to be no protection to one who might press against it, or be thrown against it without negligence on his part, then there can be recovery. It could not be required to stand against extraordinary blows or assaults upon it, but, at the same time, its object and purpose was to prevent persons from incautiously stepping or falling into it, and from being thrown into it by any misstep, jostling, or other accident not of an extraordinary character and not the result of negligence.

“The evidence in the case does not show that the guard rail was sufficient for ordinary purposes in preventing accidents and injuries, but that it was a mere makeshift, a slat that had been used in packing furniture, and which was used because there was nothing better at hand. It was exhibited to the jury, and they were thus enabled to pass intelligently upon its sufficiency. The court, upon this point, charged that ‘by a sufficient guard rail it meant such a one as is reasonably secure, and will render the shaft and opening reasonably safe under all ordinary circumstances.’ ”

**§ 43. Railings — Statutory regulations.** — In a few of the States the dangers of exposed elevator wells have been sufficiently appreciated to induce the enactment of special laws requir-

ing all elevator wells to be protected by railings or automatic trap-doors (see Appendix). And since it is a general rule of law that a failure to perform a statutory duty is negligence *per se* (Whittaker's Smith on Neg. (2d ed.), p. 55, where the cases are collated) it has been held that the violation of these statutes is conclusive proof of negligence (McRickard v. Flint, 13 Daly, 541; 114 N. Y. 222; 21 N. E. Rep. 153. See Atkinson v. Abraham, 45 Hun, 238; Bair v. Heibel, 103 Mo. App. 621; 77 S. W. Rep. 1017; Weiss v. Jenkins, 57 N. Y. Sup. 708; 39 App. Div. 567; Simmons v. Peters, 46 N. Y. Sup. 800; 20 App. Div. 251; Wender v. Peoples' House Furnishing Co., 165 Mo. 527; 65 S. W. Rep. 736; Hoard v. Blackstone Mfg. Co., 177 Mass. 69; 58 N. E. Rep. 180; Illinois Fuel Co. v. Parsons, 38 Ill. App. 182; Odin Coal Co. v. Denman, 185 Ill. 413; 77 N. E. Rep. 192. And see *post*, §§ 46, 79, 95, 128. *Contra*, Whelmann v. American Ice Co., 209 Pa. St. 398; 38 At. Rep. 849). Such statutes are admissible in evidence (Dawson v. Sloan, 17 Jones & S. 304; 10 N. Y. 620).

The use of a chain in guarding an elevator opening is compliance with a statute requiring a substantial railing (Malloy v. New York Real Estate Association, 156 N. Y. 205; 50 N. E. Rep. 853; 41 L. R. A. 487, reversing *s. c.* 13 Misc. Rep. 496).

But the mere fact that a person has violated the law is not sufficient to charge him with liability for an accident, unless the violation of the statute has something to do with the occurrence of the accident (*Weinberger v. Kratzenstein*, 71 N. Y. Sup. 245; 35 Misc. Rep. 74; citing *Stewart v. Ferguson*, 34 App. Div. 515; 54 N. Y. Sup. 615).

Where a hoistway was not in actual use at the time an employee falls into it and was not protected by a railing, it was held to be a question for the jury whether the hoisting was guarded as required by Laws of 1887, chapter 566 (*McCauley v. Smith*, 19 N. Y. Sup. Rep. 991; 65 Hun, 620).

§ 44. **Trapdoors and hatchways.**— The learned authors of *Shearman & Redfield on Negligence*, vol. 2, § 719, of that treatise, say: —

“Trapdoors, hoistways, elevator shafts, and similar openings in floors, unless far removed from those parts of the building which are lawfully used by persons not having actual notice of their existence, should be protected, so that no one exercising ordinary prudence could fall through them; although his knowledge of the premises and of his proximity to an elevator shaft is not conclusive that he was not exercising due care when he fell into it in the dark.” (See *Goldsmith v. Holland Building Co.*, 182

Mo. 597; 81 S. W. Rep. 1112; *Russ v. American Cereal Co.*, 110 Iowa, 743; 81 N. W. Rep. 796; *Weinberger v. Kratzenstein*, 71 N. Y. Sup. 245; 35 Misc. Rep. 74; *Sunney v. Holt*, 15 Fed. Rep. 880).

In *Engel v. Smith* (82 Mich. 1; 46 N. W. Rep. 21; 21 Am. St. Rep. 549), the court said: "Trapdoors, elevator shafts, and similar openings in floors have long been a usual and necessary part of the appliances of business in most warehouses, manufactories and other business buildings. The mere fact of their existence and use is no evidence of negligence. But they are dangerous openings, especially where they are obscured by darkness, or in such close proximity to doors that a person entering the door may step into them unawares. The fact of their dangerous character makes it the duty of those maintaining them to properly guard them when they are open. If, as in the case of the hatchway, it is not practical to guard it with a railing, it has been held that the owner is bound to give actual notice of the danger to every person lawfully approaching the place, and, in default of such notice, he is liable for all injuries resulting therefrom."

§ 45. **Trapdoors and hatchways — Illustrations.** — It is negligence to leave a hatchway open in a dark place without notice (*The Helios*

(D. C.) 12 Fed. Rep. 732); as where the open hatchway was obscured by the shade of an awning (The E. B. Ward, Jr. (C. C.) 20 Fed. Rep. 702).

But where the stevedores take charge of the loading the officers of a vessel are not required to look after the hatches (The Gladiolus (C. C.), 22 Fed. Rep. 454. S. P., The Louisiana, 74 Fed. Rep. 748; 21 C. C. A. 60; 41 U. S. App. 324). And the fact that a chute is left uncovered during repairs is not negligent, where it is not in the ordinary course of travel (Wannamaker v. Burke, 111 Pa. St. 423; 2 Atl. Rep. 500).

Damages may be recovered by the administrator of an employee who was killed by falling through an inadequately protected hatchway on a level with the floor (Hildebrand v. Standard Biscuit Co., 139 Cal. 233; 73 Pac. Rep. 163. See Delory v. Canny, 144 Mass. 445; 11 N. E. Rep. 656).

A person who is injured by falling through an unguarded hatchway on the premises of another who invited him there to repair a roof, may recover damages from the owner of the premises (Barowski v. Schulz, 112 Wis. 415; 88 N. W. Rep. 236).

**§ 46. Trapdoors and hatchways — Statutes construed.** — A statute in New York (Laws N. Y.

1887, c. 462, § 8) requires that the owner of a factory in which elevators are used shall provide trap or automatic doors at all elevator ways, so as to form a substantial surface when closed. In a case where plaintiff's intestate was at work in the elevator shaft of the defendant's factory, and a barrel on the floor above was set in motion by the vibration of the machinery and rolling into the shaft fell upon and killed intestate, it was held that proof of the defendant's failure to comply with the above statute established *prima facie* negligence on the part of the owner (Freeman v. Glens Falls Paper Mill Co., 15 N. Y. S. Rep. 657; following *McRickard v. Flint*, 13 Daly, 541; 114 N. Y. 222; 21 N. E. Rep. 153.. See *ante*, § 43; *post*, § 79).

The duty to provide the trapdoors required by the acts of 1871, 1874 and 1881 of New York, is owing to every one who may be lawfully on the premises; and its fulfillment is not dependent upon the action of the department of buildings or the fire department, or the tenants of the building either separately or collectively, but upon the owner (*Michael v. Kronthal*, 68 N. Y. St. Rep. 409).

**§ 47. Trapdoors — Contributory negligence.** — In *Connors v. Merchants Manufacturing Company* (184 Mass. 466; 69 N. E. Rep. 218), *Loring, J.*, in delivering the opinion of the

court, said, upon the subject of contributory negligence: —

“We are of opinion that where an elevator, which goes no further down than the floor below, opens a trapdoor automatically by going up and there is no warning of the starting of the elevator but the elevator ropes beginning to move, it is negligence as matter of law for a plaintiff who could have gone by another route to undertake to walk across the trapdoor when the ropes show that the elevator is below, and are quiet” (see *Karch v. Kipp*, 90 N. Y. Sup. 404).

§ 48. **Safety appliances or clutches.**— The Supreme Court of Massachusetts has said that the omission of clutches or other safety appliances in the construction of elevators is not conclusive of the owner's negligence although it is a fact which may be proved and considered by the jury in passing upon the other facts (*Shattuck v. Rand*, 142 Mass. 83; 2 Eng. Rep. 378. S. P., *Young v. Mason Stable Co.*, 89 N. Y. Sup. 349; 96 App. Div. 305. See *Stringham v. Stewart*, 111 N. Y. 621; 18 N. E. Rep. 870; *Droney v. Doherty*, 186 Mass. 205; 71 N. E. Rep. 547). Subsequent to the date of this decision a statute has been enacted in Massachusetts requiring that all elevators be provided with suitable mechanical devices for

securely holding the cabs or cars in case of an accident (see Appendix). Under the general rule of law above indicated (see *ante*, § 30), governing the construction and maintenance of machinery which is dangerous to life or limb, where an injury is caused by the want of proper safety appliances it must be shown that the plaintiff did not know, or was under no duty to know of the absence of such appliances and that the defendant either knew or could have known of their absence by the exercise of proper diligence (see *Fairbank Canning Co. v. Innes*, 24 Ill. App. 35, cited *post*, § 121). In the case of *Hansen v. Schneider* (58 Hun, 60; 11 N. Y. S. Rep. 347; see *Kage v. Rob Roy Hosiery Co.*, 51 Hun, 519; 21 N. Y. St. Rep. 668; *Kleibaz v. Middleton Paper Co.*, 180 Mass. 363; 62 N. W. Rep. 371; *McGregor v. Reid*, 178 Ill. 464; 6 Am. Neg. Rep. 28; 53 N. E. Rep. 323; reversing 76 Ill. App. 610), where the plaintiff, who was an employee of the defendant, was injured while riding on a freight elevator in a building leased by the defendants and others, the court said: "This elevator had not been supplied with a safety clutch, which was described to be a bolt or ball connected with a heavy spring kept in tension by a rope, which when slack or broken permitted the spring to shoot the bolt into the slides in the side posts on which the elevator is



guided, locking it firmly and immovably there. And it was for the want of this appliance that the defendants were prosecuted to recover indemnity for the injuries. But the defendants were not shown to have been aware of the fact that the elevator had not been provided with this or any other clutch. And the premises had not been so long in their possession or subject to their inspection, as to subject them to the charge of negligence for not ascertaining that this was its condition. \* \* \* And there was no proof that the absence of the clutch was so obvious or conspicuous as to be readily seen by persons examining the lofts for the purpose of hiring, which is the most that they can be assumed to have done. And if that were not a fact, then the defendants could not be legally charged with negligence on account of the elevator not being supplied with a clutch." But the owner is under no duty to passengers to put safety appliances on freight elevators not intended to be used in carrying passengers (*Kern v. De Castro & Donner Sugar Refining Co.*, 125 N. Y. 50; 25 N. E. Rep. 1071; reversing 5 N. Y. Sup. 548. See *Hale v. Murdock*, 114 Mich. 233; 72 N. W. Rep. 150; *Sievers v. The Peters Box & Lumber Co.*, 151 Ind. 642; 50 N. E. Rep. 877; and see *ante*, § 38).

**§ 49. Safety appliances or clutches. — Continued.** — Where safeguards have been provided but removed by a co-employee, the employer is not liable for an injury to an employee. (*Honor v. Albryhton*, 93 Pa. 475).

And so contributory negligence bars recovery where the safeguards would not have prevented the injury. (*Spiva v. Osage Coal & Min. Co.*, 88 Mo. 68; but see *Catlett v. Young*, 143 Ill. 74; *Bartlett Coal & Min. Co. v. Roach*, 68 Ill. 174).

In the case of *Ross v. Cross* (17 Ont. App. 29), the defendants were the owners of a tannery for use in which a hoist had been built for them by a contractor, and one of them was, with the plaintiff, one of defendants' servants, aiding the contractor in putting the hoist in place and testing it. Owing to a defect in the mechanism, of which the plaintiff and defendants were ignorant, the hoist fell and the plaintiff was severely injured. Both parties were aware that no safety catches had been put in the hoist. The presence of these might have stopped the fall but their absence had nothing to do with the occurrence of the accident. It was held, that the defendants were not liable, the judgment of the Queen's Bench Division directing a new trial was set aside, and the judgment of Falconbridge, J., at the trial, restored.

**§ 50. Safety appliances or clutches — Statutory regulations.** — A few of the States have enacted special laws to some extent regulating the construction and operation of elevators, especially with regard to the use of safety appliances (see Appendix). In the province of Ontario a statute provides that: "All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device to be approved by the inspector, whereby the cab or car will be securely held in the event of accident to the shipper rope, hoisting machinery or from similar cause." In a case arising under this statute it was held that the burden of proof that an elevator catch had been approved by the inspector was upon the party alleging it and that a factory would not be declared unlawful because the catch had failed to act, if it had been approved by the inspector (*Black v. Ontario Wheel Co.*, 19 Ontario Rep. 578).

**§ 51. Statutory safety appliances — Owners not insurers.** — A statute which declares that "all elevator cabs shall be provided with some suitable mechanical device, to be approved by the inspectors, whereby cabs will be securely held in the event of an accident" (*Mass. St. 1882, c. 208*) did not intend that owners of elevators should be made insurers that the mechanical device used would absolutely and

perfectly perform its work under all circumstances. The intention of the statute was that such owners should procure a suitable device, to be approved by the State inspector, and should see that it was kept in order (*Bourgo v. White*, 159 Mass. 216; 34 N. E. Rep. 191. See *Boess v. Clausjen & Price Brewing Co.*, 12 Hun, 367; *Burke v. Witherbee*, 98 N. Y. 562). So in *Biddescomb v. Cameron* (55 N. Y. Sup. 127; 35 App. Div. 561), where the evidence showed that the elevator was of a construction in common use, and the safety appliances were such as ordinarily obtained in such structures, the court said: 'The defendants were not insurers of the safety of the appliances provided by them but they were bound to use reasonable diligence in providing safe appliances for the use of their employees (see *Hale v. Murdock*, 114 Mich. 233; 72 N. W. Rep. 150; *White v. Eidlitz*, 46 N. Y. Sup. 184; 19 App. Div. 256; *Kennedy v. McAllaster*, 31 App. Div. 453. And see, *ante*, §§ 15 *et seq.*).

§ 52. **Mining statutes construed.**— In many of the States statutes have been enacted providing for the regulation of the construction and operation of hoists and other kinds of elevators used in mines. The construction and interpretation of these statutes should be according to the es-

established principles of law applicable in such cases.

An act requiring that coal mines shall have signal systems, brakes and cage coverings is constitutional (*Commonwealth v. Bonnell*, 8 Phila. 534. See *Shoyer v. Lowell*, 134 Cal. 357; 66 Pac. Rep. 307).

A coal mining company is liable for the death of an employee who had just gotten upon a cage to be raised when coal from above fell upon him, a statute providing that cages shall be covered (*Litchfield Coal Co. v. Taylor*, 81 Ill. 590).

A "cager" employed at the bottom of the shaft of a coal mine is within the terms of the act of March, 1881 (Mo.), requiring the operator of the mine to provide safe means of lowering and hoisting persons (*Durant v. Lexington Coal Mining Company*, 97 Mo. 62, noted in *Harris' Damages by Corporations*, 1139, 1140).

But where an employee whose duty is to put catches on the brake, in compliance with the statutory requirement, fails to do so and consequently is killed, his widow and heirs cannot recover damages from the owner of the mine (*Beaucoup Coal Co. v. Cooper*, 12 Ill. App. 373).

Where a statute provides that every drum used in a mining hoist "shall be provided with

a sufficient brake to prevent accident in case of the giving out or breaking of the machinery" (Rev. Stats. Ill., Ch. 93, Sec. 6), the failure of the machinery to properly work may be regarded as a "giving out," within the terms of the statute (Beard v. Skelton, 113 Ill. 584; 13 Ill. App. 54).

A mining company is liable for an injury caused by its using inadequate and defective pulleys in raising and lowering the buckets (Indiana, etc., Coal Co. v. Buffey, 28 Ind. App. 108; 62 N. E. Rep. 279); and for failure to maintain a passageway as required by statute (Chicago-Coulterville Coal Co. v. Fidelity and Casualty Co., 130 Fed. Rep. 957); but not for the death of an employee caused by a hook used in coupling cars where over two years' use without accident was shown (Burke v. Witherbee, 98 N. Y. 562).

In Consolidated Coal Company v. Maehl, 130 Ill. 551), a recovery of substantial damages was allowed where there was a willful violation of the act requiring mines to provide safe hoisting apparatus, brake, etc., and a competent engineer (S. P. Niantic Coal & Mining Co. v. Leonard, 126 Ill. 216).

The statutory requirements as to signals applies to all underground transportation, whatever the motive power may be (Sangamon Coal Mining Co. v. Wiggerhaus, 122 Ill. 279. See

McDonald v. Rockhill Iron & Coal Co., 135 Pa. 1. See also Consolidated Coal and Mining Co. v. Floyd (Ohio), 25 L. R. A. 848, and notes).

§ 53. **Statutes construed strictly.** — Under a statute in New York (Laws, 1877, c. 462, § 8; see Appendix) requiring proprietors to inclose the shafts of elevators when deemed by the inspector to be necessary for the safety of employees, it was held that no duty devolves upon owners of buildings to procure the inspection of the elevators; that there was no general duty upon the proprietors of all establishments to provide such safeguards; and that no special duty arose until the discretion of the inspector had been exercised in each particular case, and that discretion rested upon his judgment as to whether such appliances were necessary for the protection of the employees in the particular establishment (Boehm v. Mace, 18 N. Y. Sup. 106; 28 Abb. N. C. 138. See Harris v. Perry, 89 N. Y. 308; Shields v. Robbins, 3 N. Y. App. Div. 582; and see, *ante*, § 51).

So, the liabilities created by a statute regulating trapdoors have no application where the death of a boy is caused by his pushing the trapdoor of an elevator well (Gallowshaw v. The Lonsdale Company, 25 R. I. 383; 55 At.

Rep. 932); nor where the proximate cause of an injury was the negligence of a co-employee (Spring Valley Coal Co. v. Patting, 86 Fed. Rep. 433); nor where an injury was the result of the breaking of the guard chain. (Weinberger v. Kratzenstein, 71 N. Y. Sup. 245; 35 Misc. Rep. 74). But in *Odin Coal Co. v. Denman* (185 Ill. 413; 87 N. E. Rep. 192), it is held, that in an action founded on the omission of a statutory duty, contributory negligence cannot be charged.

A city ordinance which provides that openings in a shaft or horse-well shall be protected by a rail, gate, door or drop-door, is constitutional and not void as class legislation (*Sheyer v. Lowell*, 134 Cal. 357; 66 Pac. Rep. 307. See *Commonwealth v. Bonnell*, 8 Phila. 534).

§ 54. **Notice from statutory inspector.** — In the case of *Boehm v. Mace* (28 Abb. New Cas. 139), construing the statute (Laws of 1887, chapter 462, amending Laws of 1886, chapter 409), providing that it should be the duty of the owner of any manufacturing establishment where hoisting shafts or well-holes are used to cause the same to be properly and substantially inclosed, if in the opinion of the inspector it is necessary to protect the life or limb of those employed in the establishment, the court said, upon this subject: "It is argued by



respondent that it was the duty of the defendants to inclose the elevator shaft without waiting for the notice from the inspector; quoting *Willy v. Mulledy*, (178 N. Y. 310), and *McRickard v. Flint* (114 *Id.* 222) holding that where the owner of premises is required by statute to provide certain safety appliances to be such as shall be directed and approved by a public officer or department, it is the duty of such owner to seek and obtain the necessary direction and approval, and that if he fails to do so and to provide the appliances required by the statute, he is liable for negligence. The statute invoked in this case differs from those referred to in the cases cited (Laws, 1873, chap. 863; Laws of 1874, chap. 547). There was an absolute duty imposed by those statutes; here there was no duty until the discretion of the inspector had been exercised in each particular case and that discretion depended upon his judgment as to whether it was necessary for the protection of the employees in the particular establishment; there was, therefore, no general duty upon the proprietors of all establishments to provide such safeguards, and hence no active duty was imposed upon the owners of all establishments in which elevators were in use, to invoke the exercise of the discretion of the factory inspector before continuing such use.

"It would seem, therefore, erroneous to admit proof of the statute in this case and to submit, as was done to the jury, the question of negligence of the defendants assumed to arise from a failure to comply with the statute, no case of negligence under the statute having been pleaded or proved."

§ 55. **Owner's duty to test elevator.**— To ascertain whether an elevator has been so constructed as to be reasonably safe for use it is the duty of the owner to test the machinery and to duly exert himself to discover any defects of a serious nature. He must employ the best known tests reasonably practicable and if such tests are not used he is wanting in the care and foresight required (*Treadwell v. Whittier*, 80 Cal. 595; 5 L. R. A. 498. See *post*, §§ 88-92). It seems that the same rule of diligence would require him to also periodically test the elevator during the time of its operation, with the view of maintaining it in a safe condition. But upon this subject the court in deciding *Hall v. Murdock* (114 Mich. 233; 119 Mich. 389; 78 N. W. Rep. 329; 5 Det. Leg. N. 849) said:—

"There is nothing in the case to indicate that it was feasible to have the elevator taken down and the cable detached, that it might be subjected to a strain to determine that it was safe. \* \* \* There was no evidence that

such (by weights) or any other kinds of tests of the strength of elevator cables are common and we cannot take judicial notice that they are common, or that it would be prudent to make them. Apparently it would be safe to rely upon inspection and examination rather than upon tests of a cable which might impair it."

§ 56. **After-precautions provable.**—In *Marder v. Leary* (137 Ill. 319; 26 N. E. Rep. 1093) it was held to be harmless error to admit evidence that defendants placed a bar across the doorway of the elevator on the next day after the plaintiff was injured (*Skelley v. Crutchfield*, 17 Pa. Super. Ct. 198; see *O'Malley v. Twenty-five Associates*, 170 Mass. 471; 49 N. E. Rep. 641; *Kreider v. Wisconsin River Paper and Pulp Co.*, 110 Wis. 645; 86 N. W. Rep. 662; *Spees v. Boggs*, 198 Pa. St. 112; 47 At. Rep. 875; *Pfeiffer v. Ringler*, 12 Daly, 437).

But in *Hodges v. Percival* (132 Ill. 53), it was held to be error to allow a witness to testify that since the injury complained of, an air cushion has been used to break the force of any possible fall of the elevator. The court said, upon this point: —

"Evidence of precautions taken after an accident is apt to be interpreted by a jury as an

admission of negligence. The question of negligence should be determined by what occurred before and at the time of the accident, and not after it. New measures or new devices adopted after an accident, do not necessarily imply that all previous devices or measures were insufficient.

“A person operating a passenger elevator is bound to avail himself of all new inventions and improvements known to him, which will contribute materially to the safety of his passengers whenever the ability of such improvements has been thoroughly tested and demonstrated, and their adoption is within his power, so as to be reasonably practicable. For this reason it was proper to show that a valuable device for securing safety was known to the defendant, and its use neglected by him, before the accident; but it would seem unjust that he could not take additional precautions after the accident without having his acts construed into an admission of prior negligence. Persons to whose negligence accidents may be attributed, will hesitate about adopting such changes as will prevent the recurrence of similar accidents, if they are thereby to be charged with an admission to their responsibility for the past. The happening of an accident may inspire a party with greater diligence to prevent a repetition of a similar occurrence, but the exercise of such increased

diligence ought not necessarily to be regarded as tantamount to a confession of past neglect.

"We are aware that there is a conflict of authority upon this subject. In Pennsylvania evidence of precaution taken after the accident has been held competent (*Penn. R. R. Co. v. Henderson*, 51 Penn. 315; *Westchester & P. R. R. Co. v. McElwee*, 67 *Id.* 311; *McKee v. Bidwell*, 74 *Id.* 218). But it has been held that such evidence is not admissible, in New York, Connecticut, Iowa and Minnesota (*Dougan v. Champlain Trans. Co.*, 56 N. Y. 1; *Baird v. Daly*, 68 *Id.* 547; *Salters v. Del. & H. C. Co.*, 3 Hun, 338; *Payne v. Troy & Boston R. R. Co.*, 9 *Id.* 526; *Morrell v. Peck*, 24 *Id.* 37; *Cramer v. City of Burlington*, 45 Iowa, 627; *Hudson v. C. & N. W. R. R. Co.*, 59 *Id.* 581; *Morse v. Minneapolis & St. Louis R'y Mo.*, 30 Minn. 465; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524").

§ 57. **Subsequent conditions provable.**—Where a customer in a store fell through an elevator shaft and was killed, in the consequent action for damages it was competent to prove by witnesses that on the day following the accident they visited the store and asked to see the guard rail of the elevator shaft but could find none, the proprietor claiming that it was broken at the time of the accident (*Rosenbaum v. Shoff-*

ner, 98 Tenn. 624; 40 S. W. Rep. 1086; and see this case quoted from *ante*, § 42. See *Krieder v. Wisconsin River Paper and Pulp Co.*, 110 Wis. 645; *Tangey v. Wilson*, 87 Mich. 453; *Droney v. Doherty*, 186 Mass. 205; 71 N. E. Rep. 547; *Hubenit v. Heide*, 73 App. Div. 200; 76 N. Y. Sup. 758).

The fact that the elevator could be safely run immediately after an accident was shown in *Hubener v. Heide*, 70 N. Y. Sup. 1115; 62 App. Div. 368.

§ 58. **Prior conditions, when provable.**—Where an employee was moving machinery on a truck from a freight elevator and the wheels of the truck struck the curbing of the elevator on a level with the floor, causing the machinery to fall upon and injure the plaintiff, it was held, that evidence as to the condition of the elevator at a time before the day of the accident and as to whether there was anything to prevent the elevator from going below the floor, was rightly excluded (*Marnin v. Kitson Machine Co.*, 159 Mass. 158; see *Pueblo Building Co. v. Klein*, 5 Colo. App. 348; 38 Pac. Rep. 608; *Muller v. Hale*, 138 Cal. 163; 71 Pac. Rep. 81; *Potter v. Cave*, 123 Iowa, 98; 98 N. W. Rep. 563).

But ordinarily such prior conditions can be connected by evidence with the condition at the

moment of the accident, and in such cases they become material and proof thereof should be admitted (*Auld v. Manhattan Life Insurance Co.*, 54 N. Y. Sup. 222; 34 App. Div. 491).

Thus, where an injury occurs by reason of the alleged insecurity of the substructure of a derrick, evidence of a similar accident five years before was held to be admissible, it being also shown that no repairs had been made since the first accident (*Dyas v. Southern Pacific Co.*, 140 Cal. 296; 73 Pac. Rep. 972. See *Mulvey v. R. I. Locomotive Works*, 14 R. I. 204; *Hubenir v. Heide*, 73 App. Div. 200; *Skelley v. Crutchfield*, 17 Pa. Super. Ct. 198; *Russ v. American Cereal Co.*, 110 Iowa, 743; 81 N. W. Rep. 796; *Vandicar v. Universal Trust Co.*, 80 N. Y. Sup. 290; 80 App. Div. 274; *Hodges v. Bearse*, 129 Ill. 87; 21 N. E. Rep. 613; *Crigler v. Ford*, 26 Ky. Law Rep. 784).

Where evidence was given that the elevator in question was, at the time it was put in, a reasonably safe and proper one as a freight elevator; but evidence was given tending to show that for some time prior to the injury complained of it would occasionally become unruly and the evidence was otherwise conflicting, each instruction to the jury on behalf of the successful party must be accurate or the judgment will be reversed (*Star and Crescent Milling Co. v. Thomas*, 27 Ill. App. 137).

**§ 59. Evidence of negligence in construction.—**

To make out a case of negligence in maintaining an unguarded elevator shaft, it must be shown that the construction and general surroundings were of such a character as to render it dangerous to persons properly upon the premises (*Wilsey v. Jewett*, 122 Iowa, 315; 98 N. W. Rep. 114; *Russ v. American Cereal Co.*, 110 Iowa, 743; 81 N. W. Rep. 796; see *post*, §§ 168, 169).

**§ 60. Presumptive evidence of negligence in construction.—**

The falling of an elevator without some explained and apparent cause is presumptive evidence of negligence in its original construction (*Womble v. Grocery Company*, 135 N. C. 474; 47 S. E. Rep. 493; *Springer v. Ford*, 189 Ill. 430; 52 L. R. A. 930; 59 N. E. Rep. 953, affirming 88 Ill. App. 529. See *Gerlach v. Edelmeyer*, 15 Jones & S. 292; *Brennan v. Gordon*, 3 N. Y. Sup. 604; *Shattuck v. Rand*, 142 Mass. 83; 2 New Eng. Rep. 378; *Turnier v. Lathers*, 36 N. Y. St. R. 821; *Davidson v. Davidson*, 46 Minn. 117; *Hartford Deposit Co. v. Sollett*, 172 Ill. 225; *Pioneer Fire Proof Const. Co. v. Sandberg*, 98 Ill. App. 36; *Conlin v. Rogers*, 39 N. Y. St. Rep. 51; 14 N. Y. Sup. 782; 44 Alb. L. J. 153; *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705; 69 Pac. Rep. 378; Law-



son v. Mersall, 69 Hun, 278; 53 N. Y. St. Rep. 424; 23 N. Y. Sup. 560; Moran v. Racine Wagon Co., 74 Hun, 454; 57 N. Y. St. Rep. 198; 26 N. Y. Sup. 852; Stackpole v. Wray, 74 App. Div. 310; 77 N. Y. Supp. 633. And see *post*, §§ 93, 94. But see Hubener v. Heide, 70 N. Y. Sup. 1115; 62 App. Div. 368). Whilst the general rule undoubtedly is, that the burden of proof that the injury resulted from negligence on the part of the defendant, is upon the plaintiff, yet in some cases the very nature of the action may of itself and through the presumption it carries supply the requisite proof" (Howser v. C. & P. R. R. Co., 80 Md. 146, quoted and approved in Winkelman v. Colladay, 88 Md. 78; 4 Am. Neg. Rep. 645), in which an employee was struck upon the head by a dumb waiter which fell by reason of the breaking of the rope supporting it but there was no evidence to explain the breaking of the rope.

But in a case where an employee, engaged in receiving materials on the top of a house, fell, pulling down with him the hoisting apparatus, it does not necessarily follow that the hoisting apparatus was defective for the purpose for which it was intended to be used (Bell v. Refuge Oil Co., 77 Miss. 387; 27 So. Rep. 382).

The burden of rebutting the presumption of negligence in such cases is upon the operator

or owner (*Springer v. Schultz*, 105 Ill. App. 544; affirmed, 205 Ill. 144; 68 N. E. Rep. 753).

§ 61. **Presumptive evidence of negligence in construction — *Griffin v. Manice*.** — In the case of *Griffin v. Manice* (73 N. Y. Sup. 559; 36 Misc. Rep. 364; *s. c.* 166 N. Y. 188; 52 L. R. A. 992; 29 N. E. Rep. 925, reversing *s. c.* 62 N. Y. Sup. 364; 47 App. Div. 70); it was shown that the elevator was constructed by a competent manufacturer but that when it bumped upon the springs at the bottom of the shaft the two thousand pound counter-weight broke and fell upon and killed the operator. There was no evidence as to the cause of the fall of the counter-weight and no proof of any similar accident was offered. Russell, J., in delivering the opinion of the court, said: "The more deeply we analyze the facts surrounding this accident, the more the conviction grows of the necessary application of the question of reasonable human endeavor to the rule that the circumstances of an event may speak for its cause. Presumptions designed to evidence fault cannot be used to punish innocence. The only liability which rested upon this defendant was the exercise of reasonable foresight and effort. The rule has always been so applied in the various cases coming before the court. The

citations given below are but a few of those which recognize its certainty: Ordinary foresight and prudence is the care required. *Hubener v. Heide*, 62 App. Div. 368; 70 N. Y. Sup. 1115. So applied where the bonnet to a steam valve blew off. *Reiss v. Steam Co.*, 128 N. Y. 103; 28 N. E. 24. If the defect in the chain could have been discovered by ordinary care, even though ordinary use might cause it, the verdict cannot be sustained, and the court of appeals will examine the facts to see if the jury acted upon anything beyond conjecture. *De Graff v. Railroad Co.*, 76 N. Y. 125, 129, 131. The plaintiff must show affirmatively that the cause of the defect was the one for which defendant was responsible, to justify recovery, where more than one cause might have occasioned it. *Searles v. Railway Co.*, 101 N. Y. 661; 5 N. E. 66; *Taylor v. City of Yonkers*, 105 Ill. 202; 11 N. E. 642; 59 Am. Rep. 492. The use of an elevator without any similar accident aids strongly in determining that the jury was not justified in finding the defendant in fault. *McGrell v. Building Co.*, 153 N. Y. 265; 47 N. E. 305. If reasonable prudence could not foresee that an injury was likely to come by proximate cause, defendant is not liable. *Beetz v. City of Brooklyn*, 10 App. Div. 382; 41 N. Y. Sup. 1009.

"The care used by this defendant in the selec-

tion, inspection, maintenance, and repair of this elevator was all that human skill may be expected to observe. He cannot be held responsible for not averting so unprecedented an event as that which caused the death of the intestate, or for not connecting any previous manifestations of the electric power furnished to his motor with the probability that it would act with such violence upon the counter-balance weights."

Negligence will not be presumed against a plaintiff who has complied with the duty to provide a safe appliance (*Droney v. Doherty*, 186 Mass. 205; 71 N. E. Rep. 547).

**§ 62. Presumption of freedom from negligence.**—The fact that an elevator had been operated for a considerable period of time does not justify the presumption that the owner was free from negligence where there was proof which led the jury to believe that it was not properly constructed (*Grifhahn v. Kreiger*, 70 N. Y. Sup. 973; 62 App. Div. 413; S. P., *Bruce v. Beall*, 99 Tenn. 303; 2 Chic. L. J. Wkly. 464; 41 S. W. Rep. 445; 9 Am. & Eng. R. R. Cas. (N. S.) 841).

But ordinarily when an appliance or machine not obviously dangerous has been in daily use for a long time, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of imprudence or

carelessness (*Stringham v. Hilton*, 111 N. Y. 188; 18 N. E. Rep. 870; 1 L. R. A. 483).

§ 63. **Expert evidence.**—The testimony of experts is admissible to show the manner of construction and the condition of maintenance of elevators, derricks and other mechanical devices and appliances, in actions for injuries alleged to have been caused by negligence therein (see *Scandell v. Columbia Construction Company*, 64 N. Y. Sup. 232; 50 App. Div. 512; *Bruce v. Beall*, 99 Tenn. 303; 2 Chic. L. J. Wkly. 464; 41 S. W. Rep. 445; 9 Am. & Eng. R. R. Cas. (n. s.) 841; *Hall v. Murdock*, 114 Mich. 233; 72 N. W. Rep. 150; *Nutzmann v. Germania Life Insurance Co.*, 78 Minn. 505; 81 N. W. Rep. 518; 82 Minn. 116; 84 N. W. Rep. 730; *Couch v. Watson Coal Co.*, 46 Iowa, 17). In delivering the opinion of the court in *Partlett v. Dunn* (Va.), 46 S. E. Rep. 467), *Buchanan, J.*, said:—

“Where the facts from which negligence is to be inferred are within the range of ordinary human experience the opinions of the men on the jury, in the eye of the law, are better than those of experts; but where the injury involves questions of science or skill, expert evidence is admissible. The manner in which such a hoisting apparatus should be constructed, placed in position, and fastened so as to make it reason-

ably safe and suitable for the work to be done, cannot be said to be within the range of the experience of men not skilled in the use of such appliance. Expert evidence was therefore admissible to show the usual method of putting up such an appliance, but some of the answers of the witness seem to give his own practice in gauging an 'A' derrick, rather than the usual or customary manner of doing such work. Such evidence was not proper. *Richmond Locomotive Works v. Ford*. 94 Va. 627; 27 S. E. Rep. 509." See *Hubener v. Heide*, 70 N. Y. Sup. 1115; 62 App. Div. 368; 76 N. Y. Sup. 758; 73 App. Div. 200. And in *Luman v. Golden Ancient Channel Mining Company* (140 Cal. 700; 74 Pac. Rep. 307), it was held that where a mining engineer has testified as an expert concerning matters of construction the court alone was entitled to decide the question of safety.

Whether a governor should be used on an elevator and how it should be used are questions requiring skilled knowledge concerning which expert testimony is admissible (*Union Show Case Co. v. Blindauer*, 75 Ill. App. 358; affirmed in 175 Ill. 325; 51 N. E. Rep. 709).

**§ 64. Expert evidence — *Dyas v. Southern Pacific Company*.** — In this important case (140 Cal. 296; 73 Pac. Rep. 972), the facts were that an employee was killed by the falling upon

him of the counter-balance of a derrick alleged to have been placed in an insecure position upon a platform to which it was clamped.

Lorigan, J., in delivering the opinion of the court, said, among other things: "Counsel insist that these matters were not the subject of expert evidence; that they did not involve the knowledge of any science or art, but were within the experience of all men of common education and that they called for the opinion of the witnesses upon a matter that the jury was to determine. While the general rule is, that witnesses must testify to facts and not conclusions, there are exceptions to the rule, and we think the matters under inquiry come within the exception.

The construction of derricks, the principles under which they are operated, the mechanical forces involved, the effect of imperfect construction, and the results necessarily incident thereto are not matters of which ordinary persons have knowledge. These derricks are of limited use and of somewhat complicated construction, and this of itself precludes the idea that an ordinary man is either familiar with their construction or the principles of their operation. Under such circumstances it is always permissible to allow the testimony of those who on account of special training and skill are competent to give it, to go before the

jury. *Callon v. Bull*, 113 Cal. 593; *McFaul v. Madera Flume &c. Co.*, 134 Cal. 313; *Snyder v. Holt Mfg. Co.*, 134 Cal. 326."

§ 65. **Evidence of custom.**—As above seen employers are not insurers of safety (*ante*, § 51) and the test of negligence in methods, machinery and appliances is the ordinary usage of the business (*Leonard v. Herrmann*, 195 Pa. St. 222; 44 At. Rep. 723. See *Daley v. American Printing Co.*, 152 Mass. 581; 26 N. E. Rep. 135; *Stewart v. Harvard College*, 12 Allen, 58. And see, *ante*, § 15).

"Before a custom can affect the rights of parties, it must be so general that a knowledge thereof by them may be presumed (*Couch v. Watson Coal Co.*, 46 Iowa, 17. See *Durell v. Hartwell*, 16 R. I. 125; 28 At. Rep. 448).

The jury is entitled to consider the usual custom and manner of lighting hatchways in a case where one of the parties was injured by falling into an open hatchway (*Sunney v. Holt*, 15 Fed. Rep. 880).

It is not competent to prove a custom among carpenters to inspect staging to ascertain that it is safe before going upon it, in a case where carpenters are injured by the falling of staging provided by the superintendent of a building in which they are engaged in constructing an



elevator (*Bourbannais v. West Boylston Mfg. Co.*, 184 Mass. 250; 68 N. E. Rep. 232).

But expert evidence is admissible to show the customary method of constructing a hoist and fastening it in position (*Partlett v. Dunn* (Va.), 46 S. E. Rep. 467).

And in *Stover Manufacturing Co. v. Millane* (89 Ill. App. 532) it was held to be competent to show a custom among builders of elevators to equip them with safety devices intended to prevent their sudden falling.

But proof of custom is not conclusive against allegations of negligence or defective construction (*Nyback v. Champagne Lumber Co.*, 109 Fed. Rep. 732; 48 C. C. A. 632).

In *Tvedt v. Wheeler* (70 Minn. 161; 72 N. W. Rep. 1062), it was held that evidence was competent tending to show that it was the custom in the warehouse where the injury to the plaintiff occurred that if the elevator was wanted on another floor than the one at which it was standing, the employees wanting it would call to the man on the floor where the elevator was, who would send it up or down as the case might be.

§ 66. **Burden of proof.** — The general rules of evidence apply to cases of the character here treated. (See, *post*, §§ 96, 168, 169.) The plaintiff is required to prove the facts, constituting the negligence alleged, by a

preponderance of the evidence (*Hendrix v. Coolee Cotton Mills (N. C.)*, 50 S. E. Rep. 561), and if his evidence is evenly balanced by that of the defendant he cannot recover (*Field v. French*, 80 Ill. App. 79; *Spees v. Boggs*, 198 Pa. St. 112; 47 At. Rep. 875).

Where there is evidence that the machinery used in hoisting dirt from a mine was reasonably safe for the purpose for which it was intended, the burden of proof is upon an employee injured by the fall of a bucket to show that the machinery was defective or inadequate (*Luman v. Golden Ancient Channel Mining Co.*, 140 Cal. 700; 74 Pac. Rep. 307).

A person injured while oiling a machine which started suddenly has the burden of proving that it started of its own accord (*Shaughnessy v. Sewall & Day Cordage Co.*, 160 Mass. 333; 35 N. E. Rep. 1130).

§ 67. **What constitutes complete sale.** — In the case of *C. & C. Electric Motor Co. v. D. Frisbie & Company* (66 Conn. 67; 33 At. Rep. 604), where the defendant sold the plaintiff an elevator and agreed to guarantee its satisfactory operation for one year and the plaintiff received and used the elevator for four or five weeks without complaint, a question arose as to what constituted the acceptance and completion of the sale. Upon this subject, the court said:

“In order to constitute a complete sale there must be an acceptance of the goods sold. In case of what is called an executed sale the very fact that it is executed, involves the existence of opportunity for inspection before receipt by the vendee, and such opportunity existing, acceptance is inferred, from receipt, and under the contract. But in case of sale by sample, or of an article to be manufactured, no such opportunity exists at the time of the contract. When, therefore, the goods are tendered, the vendee may refuse to receive them if they are not such as warranted. And even when received, such receipt will not constitute acceptance, provided it does not afford a present reasonable opportunity for examination and inspection; for until such opportunity the vendee is not to be held to have accepted. But after acceptance there is no longer any difference between an executed and an executory sale for the simple reason that there is no longer any executory sale. It has then become executed.”

§ 68. **Warranty.** — In the case of *Whittier Machine Co. v. Graffam* (156 Mass. 415; 31 N. E. Rep. 485), there was an agreement to furnish “two passenger elevators, each operated by one of our hydraulic hoisting machines upon a central pressure tank system” which

"machine" will lift a load of 1,200 pounds and ascend at the rate of 200 feet per minute with average loads whether run by steam power or by a supply of water under pressure from the street mains. "To operate the two foregoing passenger elevators" the vendors agree to furnish and set up "the pump, tanks, and hydraulic piping comprising our pressure tank system, etc." It was held that the contract should not be construed as warranting that the capacity named could be maintained with only the pressure from the street mains, without the use of the steam pumps, and that it was competent evidence that these two modes of pressure were wholly different in kind.

In *Clarke v. Johnson Foundry and Machine Co.* (19 Ky. L. Rep. 973; 42 S. W. Rep. 844), there was a contract by which the appellees agreed to furnish to the appellant a particular elevator "suitable for passenger and freight service," but the appellant insisted that the elevator furnished was defective and after six months of delay caused it to be removed, whereupon this suit was brought for the contract price. Burnham, J., in delivering the opinion of the court, stated the balance of the material facts and the law as follows: "It is the precedent condition under the written contract with appellees that they should build an elevator suitable for the purposes for which it was to be

used before they were entitled to demand any part of the contract price. The claim of appellees, that appellants had taken it out of their power to perfect the machine by removing it from the building is not supported by the testimony. From the time this work could have properly been completed, in September, until it was removed in April (a period of six months), appellees were continually urged to put the elevator in the condition required by the contract, and the tenants of appellant had refused to pay rent because of the failure of the elevator to perform the service required; and, in fact, this suit was instituted before the machine was removed, and then after full notice in writing. 'Where a dealer contracts to supply an article in which he deals, to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the dealer, there is an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied.' *Benj. Sales* (2d Ed.), p. 631. In such a case the buyer relied upon the skill and judgment of the dealer, and not upon his own; and, indeed, this is a condition of the written proposition relied on by appellees. It is entirely unreasonable to believe that appellants, who were not practical machinists, and who had had no experience with elevators of any kind, would have undertaken to buy a par-

ticular kind of elevator without any conditions or stipulations in the contract that it was to perform the service required; but, even if the determination of the question involved rests wholly upon the contention of appellees as to the contract, we do not think that they were entitled to recover, as the alleged written contract shows that the machine was to be 'suitable for passenger and freight service,' for which it was to be used by appellants. As appellants used the pipe connections with the water main, and a portion of the cylinder which had been put into the ground, in the erection of their new machine, we think that appellees are entitled to recover the reasonable value of these articles, diminished by the cost incurred by appellants in taking out the old machine, and that the appellees are entitled to have turned over to them the machine that was removed." (See *Francis v. Cockrell*, L. R. 5 Q. B. 184.)

But an express warranty covering the workmanship in an elevator built according to agreed specifications does not include an implied warranty that the design of the elevator was first class nor that the elevator was suitable for the purposes for which it was intended.

"There is no principle of law casting liability upon the manufacturer in the absence of express agreement, where he performs the contract to the letter as was done in this case." (Bancroft

v. San Francisco Tool Co., 120 Cal. 228; 52 Pac. Rep. 496; reversing *s. c.* 47 Pac. Rep. 684).

**§ 69. Recovery for partial performance of contract.** — Siegel, Cooper & Company v. Eaton & Prince Co. (60 Ill. App. 639; 11 Nat. Corp. Rep. 425, affirmed in 165 Ill. 550; 44 Cent. L. J. 367; 46 N. E. Rep. 449), was a suit instituted by the appellee to recover for the part performance of a contract entered into with the appellant for the erection of an elevator in a building occupied by the appellant. At a time when the engine had been placed upon its foundation and other materials prepared and labor done of the value of \$1,390.00, all were destroyed by a fire which swept the premises without the fault of either party to the contract. In affirming a judgment for said amount in favor of the appellee the court said: "Where the point is reached in the performance of the contract to put work into a building, at which the party doing the work is entitled to be paid, he may recover at least to the extent of the money due him by the terms of the contract, notwithstanding the work done and the structure into which it has been put be destroyed by fire, or other accident not within his control. Schwartz v. Saunders, 47 Ill. 18."

§ 70. **Patent rights.** — The Bassett patent, No. 453,955, for the controlling of the mechanism of elevators, has been held to be void because too broad, covering prior patents (*Otis Elevator Co. v. Portland*, 127 Fed. Rep. 557).

§ 71. **In public buildings.** — A statute requiring public advertisement to be made for bids on the alteration of public buildings applies to a case where an elevator is to be replaced in a shaft in a court house (*State, Card v. Zoller*, 18 Ohio C. C. 275. (See *Bigby v. United States*, 103 Fed. Rep. 597)).



## CHAPTER III.

### OPERATION.

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§ 72. **Duty of operator.** — Although not insurers, operators of elevators are charged with the utmost human prudence in caring for the safety of the lives and limbs of all who lawfully enter or approach their elevators. They are bound to employ competent servants, keep the entrances and immediately adjoining floors suf-

ficiently lighted and exercise due care in the performance of every act incident to the running of elevators. (See *Phillips Co. v. Pruitt*, 26 Ky. Law Rep. 1105; 82 S. W. Rep. 599; *Blackwell v. O'Gorman Co.*, 22 R. I. 638; 49 At. Rep. 28; *Nutzmann v. Germania Life Insurance Co.*, 82 Minn. 116; 84 N. W. Rep. 730; *Haymarket Theater Co. v. Rosenberg*, 77 Ill. App. 184. And see legal bibliography, 9 L. R. A. 643; 23 L. R. A. 155; 25 L. R. A. 33, 34.) Thus in *Mitchell v. Marker* (62 Fed. Rep. 139) it was held that a landlord who runs an elevator for the accommodation of his tenants and their visitors must use the highest degree of care which human foresight can suggest, not only as to the conduct of his servants but as to the condition of the machinery (see *Gordon v. Cummings*, 152 Mass. 513; 9 L. R. A. 640; *Hodges v. Bearse*, 129 Ill. 87; 21 N. E. Rep. 613; *Cleary v. Brooklyn Factory and Power Co.*, 79 N. Y. Sup. 1041; 79 App. Div. 35). This case suggests the general rule that the operators of elevators are liable for accidents caused by their want of reasonable diligence in looking after the condition of the machinery and appliances (see *Heske v. Samuelson*, 12 L. R., Q. B. Div. 30; 53 L. J., Q. B. Div. 45; *Bier v. Standard Mfg. Co.*, 130 Pa. St. 446; *Montgomery v. Bloomingtondale*, 54 N. Y. Sup. 329; 34 App. Div. 375;

Hale v. Murdock, 114 Mich. 233; 72 N. W. Rep. 150; Griffin v. Manice, 62 N. Y. Sup. 364; 7 App. Div. 70; Bogendoerfer v. Jacobs, 89 N. Y. Sup. 1051; Rincicotti v. John J. O'Brien Contracting Co. ( Conn. ), 60 At. Rep. 115; Droney v. Doherty, 186 Mass. 205; 71 N. E. Rep. 547; Donovan v. Gay, 97 Mo. 440). Bearing upon this point it has been decided that one has no right to assume that because a certain elevator has never given way, it therefore never will (Goodsell v. Taylor, 41 Minn. 209; 42 N. W. Rep. 873).

In the case of Stephens v. Chaussé (15 Can. Sup. Ct. 379), the material facts were that an architect, who had his office in the third flat of a building, in which the landlord had placed an elevator for the use of tenants, in going to his office entered the open door of the elevator, which was not there, fell into the cellar and was seriously injured. In the suit brought by him against the landlord it was proved that the elevator boy in the employ of the landlord had left the elevator with the door open to go to his lunch, leaving no substitute in charge. It was also shown that the plaintiff had previously sustained a serious fracture of his skull and also that he had been in the habit of using the elevator in the absence of the boy. The trial court awarded the plaintiff five thousand dollars damages, which upon appeal to the court of

Queen's Bench was reduced to three thousand dollars.

In affirming the judgment below, it was held that the landlord was liable for the negligence of the boy in charge of the elevator, and that the amount of damages awarded was not unreasonable.

**§ 73. Duty of operator compared with that of owner.** — In accordance with the well-established principle of law treated in the books on real property and elsewhere, it may be safely stated as a rule that whenever damage is caused by defects or insufficiency in the plans or manner of construction of an elevator the owner is liable therefor, and whenever damage is caused by negligence in the operation or failure to properly maintain the same the operator is liable. This general rule is of course subject to some modifications in its varied applications. Thus, as has been heretofore seen (see *ante*, §§ 30-32) there are limitations upon the liability of the owner where the defects are latent and could not have been discovered by the exercise of reasonable diligence. And where the defects are patent but the operator persists in running the elevator there is no doubt of his liability and ordinarily in such a case the owner is also liable for injury resulting therefrom. (See *Hale v. Murdock*, 114 Mich. 233; 72 N. W. Rep. 150; *Luckel v.*

Century Building Co., 117 Mo. 608; 76 S. W. Rep. 1035; Rhodius v. Johnson, 24 Ind. App. 402; 56 N. E. Rep. 942; Henson v. Beckwith, 20 R. I. 165; 37 At. Rep. 702; 38 L. R. A. 716; 3 Am. Neg. Rep. 95; 2 Chic. L. J. Wkly. 399; Miller v. Brewster, 53 N. Y. Sup. 1; The Oriental v. Barclay, 16 Tex. Civ. App. 193; 41 S. W. Rep. 117; Oriental Investment Co. v. Sline, 17 Tex. Civ. App. 692; 41 S. W. Rep. 130; Conner v. Koch, 71 N. Y. Sup. 836; 63 App. Div. 257. And see, *ante*, §§ 23-29.)

In *Malloy v. New York R. E. Assoc.* (34 N. Y. Sup. 678; 13 Misc. Rep. 496) it was held that where the owner of a building, in the constructive possession thereof, rents it to several tenants, the duty of guarding an elevator shaft is upon him and not upon the tenants.

**§ 74. Operation under order of court.**—In *Board of Com'rs v. Stout* (Ind.), 35 N. E. Rep. 683; 22 L. R. A. 398), it was held that the Circuit Court may order the person employed by the county commissioners for that purpose, to operate the elevator which is the principal means of access to the Circuit Court room, and upon his refusal may direct the sheriff to operate the elevator.

**§ 75. Obligation to person injured.**—To render a person responsible to another for injuries

received from an elevator it must be shown that the former owed some duty to the latter to prevent such injury. While the owner of an elevator may always be held responsible for inherent defects in its construction if he leases the use of it to another or in any way completely surrenders its control to another, he becomes no longer liable for injuries caused by negligence in its management. In this instance the duty towards passengers, employees and others is shifted from the owner to the actual operator, who is also responsible for the proper management of the elevator. (Troth v. Norcross, 111 Mo. 630; O'Malley v. Twenty-five Associates, 170 Mass. 471; 49 N. E. Rep. 641. See *ante*, §§ 23-29.)

And a master is not liable for an injury to a person conducted to a freight elevator by a servant having no authority to do so. (Cogswell Rochester Mach. Screw Co., 57 N. Y. Sup. 145; 39 App. Div. 223. See Hall v. Poole, 94 Ind. 171; 50 At. Rep. 703. And see, *post*, §§ 157-159.)

But instead of the obligation arising from the relation of carrier and passenger or master and servant, it may arise from the duty of a landlord to his tenant or innkeeper and traveler. (Dashiel v. Washington Market Co., 25 Wash. L. Rep. 123; 10 App. D. C. 81; Sellers v. Dempsey, 49 N. Y. Sup. 765; 26 App. Div. 22;



Lyons v. Dee, 88 Minn. 490; 93 N. W. Rep. 899.) Thus, where a suit was brought by a guest against the keeper of a lodging house for injuries received by the former in falling into the unguarded shaft of an elevator while searching for a water closet in the night, it was held that the action might be maintained. The court said: "Granting that defendant had no control of the elevator shaft, or the small hall leading to it, it was his duty to have maintained a door or barrier at the entrance from the main hall to the small hall which led to the dangerous aperture." (Mauzy v. Kinzel, 19 Ill. App. 571.)

So the relation may be temporarily transferred and the obligation shifted by contract. (Thayer v. Checkley, 127 Fed. Rep. 556. See, *ante*, §§ 27-29; *post*, §§ 106, 107, 130.)

Whether it was negligent to operate a noisy gasoline engine near a traveled way is for the jury to determine. (Wolf v. Des Moines (Iowa), 98 N. W. Rep. 301.)

**§ 76. Obligation to person injured — Volunteer.**—The wife of the janitor of an apartment house or hotel, for the purpose of showing a new tenant where to hang clothes, went, at the request of her husband, to the roof by a stairway. In returning she used a freight elevator, which she entered by stepping over a rail or bar placed across the entrance to the

elevator about eighteen inches from the floor, and locked. She chose that method of descent for her own convenience. She was not shown to have had any knowledge of a rule forbidding the riding on the elevator, and she had seen others riding on it without objection from the superintendent of the building. In an action against the owner of the hotel for damages for injuries sustained by reason of the alleged defective condition of the elevator, it was held, that the plaintiff was a "volunteer, using the elevator without any authority or license whatever from the defendant for the purpose of assisting her husband, and that the defendant owed no duty to her to see that the elevator was in a safe condition, but only to abstain from willful injury to her." (*Billows v. Moors*, 162 Mass. 42; 37 N. E. Rep. 750. See *Thompson on Neg.*, § 3907.)

A chambermaid in a hotel is not a volunteer, assuming extraordinary risks, in using an elevator which she is permitted but not compelled to use. (*The Oriental v. Barclay*, 16 Tex. Civ. App. 192; 41 S. W. Rep. 118; *Oriental Investment Co. v. Shine*, 17 Tex. Civ. App. 692; 41 S. W. Rep. 130.)

Where a foreman gave an order to a group of men and one of those who responded was killed by falling from an elevator it is a question for the jury to decide whether the deceased

was acting as a servant under orders or was a volunteer. (*Dallemand v. Saalfeldt*, 175 Ill. 310; 51 N. E. Rep. 645; 17 Nat. Corp'n Rep. 439, affirming 73 Ill. App. 151; 15 Nat. Corp'n Rep. 698. See *Appel v. Eaton & Prince Co.*, 97 Mo. App. 428; 71 S. W. Rep. 741.)

§ 77. **Want of light.**—In *Nash v. Kansas City Hydraulic Press Brick Co.* (109 Mo. App. 600; 83 S. W. 90) it was held that where in the performance of his duty an employee was injured while removing obstructions from the cups and endless chain of a brick-making machine, he may recover damages where it was shown that the bottom of the shaft where he worked was not properly lighted. (See *Rhodus v. Johnson*, 24 Ind. App. 402; 56 N. E. Rep. 942; *Haymarket Theater Co. v. Rosenberg*, 77 Ill. App. 184; *Parker v. Portland Publishing Co.*, 69 Me. 173; 31 Am. Rep. 262; *Humphreys v. Portsmouth Trust, etc., Co.*, 184 Mass. 422; 68 N. E. Rep. 836; *Wolf v. Devitt*, 82 N. Y. Sup. 189; 83 App. Div. 42; *Devaney v. Degnon-McLean Const. Co.*, 79 N. Y. Sup. 1050; 79 App. Div. 62; *Browne v. Siegel, Cooper & Co.*, 191 Ills. 226; 60 N. E. Rep. 815, affirming 90 Ill. App. 49; *Poindexter v. Paper Co.*, 84 Mo. App. 352; *Trask v. Shotwell*, 41 Minn. 66; 42 N. W. Rep. 699;

*Pfeiffer v. Ringler*, 12 Daly, 437; *Bremer v. Pleiss*, 121 Wis. 61; 98 N. W. Rep. 945.)

Where defendant owned a house and operated an elevator for the convenience of the tenants, of whom plaintiff's husband was one, and plaintiff went to the elevator door, to go up, when it was opened by a boy on the outside who was the brother of the regular motorman and who had occasionally managed it, and she, ignorant that the elevator was already above, stepped through the open door into the shaft and was injured. There was no artificial light near at the time and the proof as to the necessity for it was conflicting. It was held that the question of the sufficiency of care for the safety of the tenants was for the jury to determine (*Tousey v. Roberts*, 114 N. Y. 312; 21 N. C. Rep. 399). So where the plaintiff went into a dark hall-way and stood before the elevator door for one or two minutes waiting for the elevator boy to bring the key with which he opened wide and outwardly the elevator door and stood behind it while plaintiff stepped in through the entrance, and, the cab not being there, fell down the shaft and was injured; it was held, that the finding of the jury for the plaintiff should not be disturbed (*Fisher v. Cook*, 23 Ill. App. 621; 125 Ill. 280; 17 N. E. Rep. 763).

§ 78. **Want of light — Wendler v. People's House Furnishing Co.** — In this case (165 Mo. 527; 65 S. W. Rep. 737), the original plaintiff was an employee of the defendant, and was fatally injured by falling into an unguarded elevator shaft in a poorly lighted room where he had formerly worked. In affirming the judgment for the plaintiff, Valliant, J., said: "It does not follow as a certain conclusion that because the plaintiff knew that the gate was kept open and the light turned off ordinarily, during the nine months when he worked there, that he also knew that the same dangerous practice had continued for the last nine months when he was seldom there. The duty to furnish light and a reasonable guard was a continuing duty, and its disregard for one period did not relieve the master from its performance for the other period, nor of itself render the servant chargeable with knowledge that the practice had continued. The conduct of the master in the two respects complained of seems to have been deliberate and actuated by no other motive than that of economy at the risk of the servant's safety; the orders were, to not take time to close the gate, and see how little electric light they could get along with.

"Under the circumstances, the question of whether the danger was so glaring and imminent as to make it contributory negligence in

plaintiff to continue in service, was a question for the jury and the instructions for plaintiff properly submitted it. There was no error in refusing the instruction for a nonsuit."

**§ 79. Want of light — Plaintiff's care. —**

Where an elevator shaft opened directly upon the street and within one foot of the entrance to the hallway in the same building, which hallway entrance was always opened while that of the elevator could be closed, and the plaintiff in seeking to enter the hallway on a dark evening, with no light near, stepped into the elevator entrance, which was not closed, and was injured, it was held that the jury might find it to be negligence to leave the elevator so exposed. Upon the question of the plaintiff's want of care the court said: "There remains the question whether the plaintiff offered any sufficient evidence of due care. He knew the character and description of the premises; he passed them many times, and was aware that the two entrances were close to each other; but his previous knowledge of their dangerous proximity is not conclusive that he was not exercising due care in attempting to enter (*Looney v. McLean*, 129 Mass. 33). He described the care with which he moved, his feeling his way, his effort to ascertain when he stepped upon the threshold that he was in the right entrance."

(Gordon v. Cummings, 152 Mass. 513; 25 N. E. Rep. 978. See Olson v. Hanford Produce Co., 111 Iowa, 348; 82 N. W. Rep. 903.)

An employee of a tenant is not guilty of contributory negligence where he, desiring to descend from an upper floor of the building, thinks he hears the door of the elevator open but on account of the darkness is unable to see and upon stepping into the elevator shaft falls to the cellar and is permanently injured. (People's Bank v. Morgolofski, 75 Md. 432; 23 At. Rep. 1027.)

§ 80. **Plaintiff's care — Similar case.** — A case in which the facts are somewhat similar to those in the above case is *McRickard v. Flint* (114 N. Y. 222), in which it appears that the plaintiff went to a building to see one of the defendants. He was directed to another building in the rear, to which he went, but not finding the defendant there he returned to the building which he first approached and seeing a folding-door, one-half of which was partly open, he entered, although this was not the usual place of entry into the building. About nineteen inches from the door-sill was an open elevator hatchway into which he fell and was injured. The plaintiff testified that he supposed that he was entering through the main entrance; that the hatchway was not in his view; that as he en-

tered he saw the saddle of the door-sill and the floor and supposed that the latter was continuous; that he saw no elevator shafting; and that the door obscured the opening and he did not see it. Under these facts it was held, that the failure of the plaintiff to stop and look around him when he entered did not charge him with contributory negligence as a matter of law, but that the question was properly submitted to the jury. (See *Weiss v. Jenkins*, 39 App. Div. 569; *Lyons v. Dee*, 88 Minn. 490; 93 N. W. Rep. 899.)

§ 81. **Plaintiff's care — *Peoples' Bank v. Morzofski*.** — In this case (75 Md. 432; 23 Atl. Rep. 1027) the substance of the evidence was that the appellant, who was defendant below, owned a building, which was occupied by a number of tenants for business purposes, and in which was an elevator used for both passengers and freight. The appellee, who was employed by one of these tenants, was seriously injured by falling through the elevator shaft from the fourth floor to the cellar. At the time of the accident the appellee "was proceeding up the stairway to the place of business of his employer on the fourth floor, when he heard the elevator going up the shaft. When he arrived at the fourth floor, he heard the elevator thrown open on that floor. Having accomplished the



object of his visit, he returned to take the elevator, which was just outside the door of his employer's office. His testimony was that he could not see at all in the hall, and, having heard the elevator go up, the door of the elevator being open, and the bar back, he was sure the elevator was in its place. He stepped in to take the elevator, and fell down five floors, into the basement, and was seriously and permanently injured, as set forth in the testimony.

"This elevator was used every day for the people employed by the various tenants, and the boy in charge of it who was employed by the defendant daily brought down the working people from the upper stories of the building. There was a painted window on one side of the elevator, and it was very dark there; there was no gas light there and the distance from the door out of which the plaintiff came on his way to take the elevator is only about two feet from the elevator door. On re-examination, the plaintiff said he heard the elevator door thrown open; that he was sure the elevator was there, and that it was so dark that he could not see whether it was there or not. The elevator boy was not in charge at the time of the accident, nor was he aware of it until informed by one of the witnesses. In the first place, it is very clear from the foregoing recital of the facts given in evidence that there was testimony

before the jury tending to prove, if the jury believed it, that the defendant did not use that reasonable caution and vigilance which is required in the management of an elevator, which like the one described by the witnesses was used both for passengers and freight. The elevator was in charge of and operated by the defendant's agent and it was bound at all times to use reasonable caution and care to make the elevator safe for all persons who had a right to use it, or who did in fact use it with defendant's knowledge and consent. *Engel v. Smith*, 82 Mich. 1.

"This reasonable rule is also laid down in *Shearman and Redfield on Negligence*, section 719, where it is said that, although elevator shafts and openings are now very generally used in warehouses and other places of business, they are dangerous, especially if located in dark places, or in such close proximity to doors that a person entering the door may step into them unawares. And it is also said that 'when elevators remain under the control of the owner of the building he is liable to his tenants for any defect in their appointments or their management which reasonable care and vigilance would have prevented.'

"It must be admitted that the exercise of the most ordinary care by the defendant in this case would have resulted in keeping the elevator

door closed, and in preventing the injury to the plaintiff.

“But in regard to the other question, whether the plaintiff was guilty of contributory negligence, there is more difficulty and doubt.

“Ordinarily, of course, the question of negligence is one for the jury, but sometimes it becomes the duty of the court to instruct them that in spite of the negligence of the defendant the plaintiff cannot recover. The court, however, will never assume this responsibility unless the case is a very clear one, and presents, as was said in the case of *Cumberland Valley Railroad Co. v. Mangans*, 61 Md. 53, and others decided by this court, ‘some prominent and decisive act in regard to the effect and character of which no room is left for ordinary minds to differ.’ The act relied on here to show contributory negligence on the part of the plaintiff is the one established by his own testimony — namely, that he walked into the elevator shaft without looking to see if the elevator was there. He testified that he could not see at all, but that he was sure with the door open and the bar back, the elevator was in its place; and that it was so dark he could not see whether it was there or not. He does not say, he was not asked to say, whether he could see whether the elevator door was open, and the bar pulled back. The fair inference from his testimony

is that he could see that the elevator door was open, but could not see whether the elevator was or was not in its place. He says: 'The door being open, and the bar pulled back,' he was sure the elevator was there.

"It must be remembered that the hall was dark in front of the elevator and that the distance from the elevator to the door from which the plaintiff came was only one or two steps, or, as witnesses say, from eighteen inches to two feet. He had, therefore, but a moment either to look or to think. \* \* \* And so we are of opinion that the court below properly left it to the jury to find whether, under all the circumstances of this case, the plaintiff had a right to assume that the elevator was at the fourth floor where he stepped into the shaft.

"We do not mean to say it is a clear question, but on the contrary, as we have already said, it is one of considerable doubt whether the conduct of the plaintiff constitutes such contributory negligence as should prevent him from recovering. And where such doubt exists, the question of contributory negligence is one of fact, to be determined, as it was in this case, by the jury."

§ 82. **Conductor not always necessary.** — In *Murphy v. Hays* (68 Hun, 480; 23 N. Y. Sup. Rep. 70), it was held that negligence could not

be charged against the defendants because no conductor was in the car where the intestate, while assisting in removing an iron safe from the elevator, was killed by the sudden starting of the elevator turning the safe upon him; it being the opinion of the makers of the elevator, and of the engineer in charge, that, considering the great weight of the safe and the high pressure necessary, the safest method was to keep the car under the control of the engineer who was directed from above by the janitor, although some experts testified otherwise. The court said, in part: "That it was not negligence to act upon their best judgment, and the advice of those who constructed the elevator, must become apparent if for a moment we stop to consider what would be the effect of their acting contrary thereto in the event of an accident occurring. It was the view and judgment of those who constructed the elevators, and who knew the character of the pumps and the extent of the power required for raising large safes, and that of the engineer who had prior to this time adopted the system, that the safest and best mode was for the engineer to have complete control over the movement of the car, and that the interference of a conductor on the car would be a source of danger on account of the high pressure employed."

§ 83. **Using plank instead of skid in moving goods from elevator.** — Where a porter in the defendant's store was working in the cellar by pushing heavy boxes of goods near the elevator when a heavy plank used instead of the regular skid in removing similar boxes from the elevator to trucks in the alley back of the store, slipped and fell down the elevator shaft, striking and injuring the plaintiff, it was held, that the use of the plank in removing the boxes was not in itself negligence. (*Alford v. Metcalf*, 74 Mich. 369; 42 N. W. Rep. 52.)

§ 84. **Accident no ground for action.** — While the plaintiff was engaged in loading bales of hops into his wagon as they were lowered by the elevator, one of the bales on the wagon, for some unexplained cause, turned, striking him in the breast so that he was either thrown or stepped back, and fell into the shaft of the elevator and was injured. It was held, that no negligence could be imputed to the defendant, since the injury was either the result of the negligence of the plaintiff or his companion, or both, or of pure accident. (*Moll v. Riverside Storage & C. Co.*, 82 Mich. 389. See *Cowen v. Kirby*, 180 Mass. 505; 62 N. E. Rep. 968. And see, *post*, §§ 93, 94, 146.)

So in *Sorenson v. Menasher Paper & Pulp Company* (56 Wis. 338; 14 N. W. Rep. 446),

the plaintiffs' intestate, who was employed by the defendant, was found dead and bruised in a hole in the floor of the defendant's mill. The hole was made by mechanics in the proper improvement of the mill. There was no further evidence. It was held that a nonsuit was properly granted.

§ 85. **Liability of co-tenants.** — Where two or more tenants in a building have equal rights to operate an elevator erected therein for their common convenience, each tenant is liable for his own negligence in the use of the elevator but not for the negligence of every other tenant. (*Donnelly v. Jenkins*, 58 How. Pr. 252.) The case of *Kent v. Todd* (144 Mass. 478; 11 N. E. Rep. 734) was an action of tort for damages suffered by the plaintiff in consequence of falling through a hoistway. The plaintiff was a tenant of the second floor and the defendant of the first floor of the building, under leases which gave each party the use of the hoisting in common with the other tenants. The hoistway was divided from the rooms through which it passed with bolted doors opening into it on each floor, and, when not in use, could be closed by two trap-doors, which made the floor continuous. There was also a bar which could be put across the entrance when either trap-door was open. To lawfully use the hoistway, the

defendant's servant unbolted and opened the entrance door, opened one of the trap-doors, then shut and bolted the entrance door again. Prior to this the plaintiff had placed a basket of chickens inside the partition, seemingly in such a way as not to interfere with the use of the hoistway, and when afterwards he was about to go home, he unbolted and opened the entrance door and, in order to get them, went in, fell and was injured. It was held that the plaintiff, although using the hoistway for a purpose other than that for which it was designed, was not a trespasser, and that if the defendant had given the plaintiff the right to expect that when the trap-door was opened the bar would be put up and the entrance bolted, the plaintiff had the same right to rely upon this having been done when going to the hoistway for a basket of chickens as when going there to receive goods.

**§ 86. Co-tenants — Contributory negligence. —** Where an elevator in a hallway of premises used by several tenants in common is proved to have been properly inclosed and provided with doors which were kept shut while the elevator was not in use and the deceased opened the door through which he fell, he was guilty of contributory negligence and none of the other tenants were



liable for his death (*Donnelly v. Jenkins*, 58 How. Pr. 252).

A tenant's employee who was killed while trying to operate an unsafe elevator in a building containing a number of tenants who had been warned not to use the elevator in the absence of the boy having charge of the operation of the elevator, cannot maintain an action against the owner of the building even though the decedent is not shown to have had actual knowledge of the warning. (*Dasheill v. Washington Market Co.*, 10 App. Cas. (D. C.) 81. See 25 Wash. L. Rep. 123.)

§ 87. **Co-tenants — No presumption against.** — Where the plaintiff fell down an elevator shaft and for the injuries thereby sustained sued one of two occupants of the building at whose invitation he was lawfully there, and it could not be shown that the defendant had used the elevator last, it was held, that no presumption of negligence could be raised against the defendant, and, no negligence being proved, the plaintiff's action could not be maintained. (*Harris v. Perry*, 89 N. Y. 308; reversing *s. c.* 29 Hun, 244. See *Church v. Murphy*, 45 N. Y. Sup. 73; 20 Misc. Rep. 112.) In this case the substantial facts were that defendant leased all of a building above the first floor which with the basement and sub-cellar was leased to other tenants; all

the tenants had a common right to use the shipping room in the basement and a hoistway or elevator for goods running from the sub-cellar to the upper story, moved by power furnished by the owners of the building and controlled by their engineer. The plaintiff went to the shipping room to procure goods purchased of the defendant, and finding no one there to deliver them, went to the elevator to call through the opening overhead as he had done safely before. The room was dark and the elevator was not in use at the time but was up near the first floor. The trap door in the basement floor was open and the plaintiff inadvertently fell through and was injured. In the action for damages which followed it did not appear that the defendant had used the elevator last and only the supposition of the clerk indicated it; hence the conclusion above stated.

§ 88. **Duty to inspect.** — The decisions are not in harmony concerning the duty of the operator of an elevator carrying persons, either frequently or only occasionally, to make periodic inspections of its physical condition with the view of ascertaining its probable safety.

It is reasonable to conclude that where an elevator has been operated for a long term of years without any investigation of the condition of its machinery and appliances, the operator is

negligent; but where the period of time between its installation and an accident is short, it would be unreasonable to hold the operator responsible for failure to inspect it.

There is no apparent difficulty in the solution of either of these extreme propositions, but in those more frequent intermediate cases the difficulties arise. As a rule, evidence of inspection or failure to inspect is usually admissible on the general question of negligence and may be properly allowed to go to the jury. (See *The Oriental v. Barclay*, 16 Tex. Civ. App. 193; 41 S. W. Rep. 117; *McGuignan v. Batty*, 186 Pa. St. 329; 42 W. N. C. 297; 40 At. Rep. 490; *Tangey v. Wilson*, 87 Mich. 453; *Montgomery v. Bloomingdale*, 54 N. Y. Sup. 329; 34 App. Div. 975; *Bucher v. Pryhill*, 45 N. Y. Sup. 972; 19 App. Div. 126; *Goodsell v. Taylor*, 41 Minn. 207; 4 L. R. A. 673; *Oberfelder v. Doran*, 26 Neb. 118; *Egan v. Berkshire Apartment Assoc.*, 31 N. Y. St. R. 545; *Stott v. Churchill*, 36 N. Y. Sup. 476; 15 Misc. Rep. 80; *McGregor v. Reid*, 178 Ill. 464; 6 Am. Neg. Rep. 28; 53 N. E. Rep. 323, reversing 76 Ill. App. 610. And see *Thompson on Neg.* § 3902. See also *ante*, § 55.)

**§ 89. Duty to inspect — Authorities requiring.** — In the case of *Dyas v. Southern Pacific Co.* (140 Cal. 296; 73 Pac. Rep. 972), where

the cause of the death of an employee was shown to have been the insecure condition of the platform upon which a derrick car rested and the insufficiency of the counterbalance, the court said, upon this subject: "The duty of inspection is affirmative and it must be continuously fulfilled and positively performed. In ascertaining whether this has been done or not, the character of the business should be considered and anything short of this would not be ordinary care." (See *Swenson v. Metropolitan Street Railway Co.*, 80 N. Y. Sup. 281; 78 App. Div. 379; *Rincicotti v. J. O'Brien Contracting Co.* (Conn.), 60 At. Rep. 115; *Silveira v. Iverson*, 128 Cal. 192; *Jager v. California Bridge Co.*, 104 Cal. 546; *Alexander v. Central L. & M. Co.*, 104 Cal. 539. And see *Thompson on Negligence*, page 984.)

In *Bogendoerfer v. Jacobs* (89 N. Y. Sup. 1051), where it appeared that an elevator had not been inspected for three years, it was held that, in the absence of satisfactory explanation, an inference of negligence on the part of its owner was justifiable.

The jury may properly consider and allow damages to a hotel guest who was injured in the fall of a hydraulic elevator caused by the breaking of a piston corroded inside the cylinder, where it is proved that the elevator had been in use fourteen years and that in inspections

which had been made of it, the cylinder heads had not been removed. (*Stott v. Churchill*, 36 N. Y. Sup. 476; 15 Misc. Rep. 80.)

If it is shown that inspection would not have disclosed the proximate cause of the injury complained of, compliance with the duty to make inspections is relieved. (*Boess v. Clausen & Price Brewing Co.*, 42 N. Y. Sup. 848; 12 App. Div. 366. But see *The Oriental v. Barclay*, 16 Tex. Civ. App. 193; 41 S. W. Rep. 118.)

**§ 90. Duty to inspect — Authorities against. —**

In other cases the view has been taken that inspection is equivalent to the exercise of extraordinary care, which is not required of the operators of elevators. (See *ante*, § 55. And see *Juchatz v. Michigan Alkali Co.*, 120 Mich. 654; 79 N. W. Rep. 907; 6 Det. L. N. 297.)

Thus, in *Young v. Mason Stable Co.* (89 N. Y. Sup. 349; 96 App. Div. 305), the court, in referring to the requirements of inspection, said: "Such requirement treads closely upon, if it does not embrace the obligation of extraordinary care, and that duty is not imposed even as to passenger elevators. *Griffin v. Manice*, 166 N. Y. 188, 198; 59 N. E. 925; 52 L. R. A. 922; 82 Am. St. Rep. 630. The obligation is always relative. This was an elevator of comparatively simple construc-

tion. It was not intended to be used for the purpose of carrying passengers or employees. The employees were in fact prohibited from riding upon it. The use to which it was devoted was the hoisting and lowering of carriages and grain, which was done by hand from the outside. Manifestly, under such circumstances, the doctrine of reasonable care did not require an inspection of the elevator by a skilled engineer, in addition to the inspection already had."

**§ 91. Duty to inspect — Authorities against — Womble v. Grocery Co.** — In the case of *Womble v. Grocery Co.* (135 N. C. 474; 47 S. E. Rep. 493), Connor, J., in delivering the opinion of the court discussed the negative view of the law upon this subject and discussed the authorities, as follows: —

"In regard to the second proposition regarding the duty of inspection we are of opinion, both upon reason and authority, that a failure to inspect an elevator approaches very near if it does not constitute negligence. The law is fully and ably discussed in *Labatt on Master and Servant*, chapter 11. 'Negligence on the part of the master may consist of acts of omission or of commission and it necessarily follows that the continuing duty of inspection and supervision rests on the master. It will not do to say

that, having furnished suitable and proper machinery and appliances, the master can thereafter remain passive so long as they work well and seem safe. The duty of inspection is affirmative and must be continuously fulfilled and positively performed. Anything short of this would not be ordinary care. The duty of inspection being a positive and affirmative duty to be continuously performed by the defendants, the court could not say as matter of law how often such inspection should have taken place or that it was proper to omit it at some particular time. It was for the jury to say whether the defendants had used reasonable care in this respect. *Houston v. Brust*, 66 Vt. 331; *Labatt*, 157. We have, after a somewhat exhaustive examination of the authorities, found no case in which a failure to inspect an elevator for more than four months has been held sufficient to excuse the defendant. *Labatt*, section 158, note 6, "Elevator." A plaintiff was permitted to recover for injury where the clamp to which a derrick guy rope was fastened was inspected only once a week. *Welch v. Cornell*, 63 N. Y. 44.

In *McGuigan v. Beatty*, 186 Pa. 329, a failure to inspect a rope which held the weight for six months, was evidence of negligence, the court saying: "In addition to this there was an entire absence of testimony that the defendant

had ever inspected the rope, and the absence of such proof affords an inference that the duty to inspect had been neglected." "An elevator needs and should have constant care and inspection. The friction of the rope is constantly wearing the strands and when they part it is necessarily weakened. *Bier v. Mfg. Co.*, 130 Pa. 446."

§ 92. **Duty to inspect — Statutes.** — As may be seen by reference to the appendix many municipalities and States have enacted laws requiring, and usually providing for, the inspection of elevators carrying passengers. (See *post*, Appendix.)

By Pennsylvania act of May 5, 1899, it is provided that cities of the first class may regulate the management and inspection of elevators. In *Richmond Safety Gate Co. v. Ashbridge* (106 Fed. Rep. 220), it is held that this law does not confer on the councils of such a city power to condemn an entire class of elevator appliances without inspection.

§ 93. **Res ipsa loquitur.** — Ordinarily it is not enough for the plaintiff to prove the fact of the accident having happened, and his injury; but it must be further shown that the injury was the direct result of some particular act or acts by the defendant evidencing want of due care



on his part. There may be accidents in which the circumstances themselves speak proof of the defendant's negligence, but usually explanatory evidence is necessary to establish negligence. Thus, where an elevator was run by weights suspended and kept in place by iron rods and one of the weights became detached and fell, injuring the operator of the elevator car, it was held that the negligence could not be presumed from the accident (*Davidson v. Davidson*, 46 Minn. 117; 48 N. W. Rep. 560; see *Lee v. Knapp & Co.*, 58 Mo. App. 404; 137 Mo. 385; 155 Mo. 610; 56 S. W. Rep. 458; *Huey v. Gahlenbeck*, 121 Pa. St. 238; *Griffen v. Manice*, 166 N. Y. 188; 52 L. R. A. 992; 29 N. E. Rep. 925, reversing 62 N. Y. Sup. 364; 47 App. Div. 70; *Bullock v. Butler Exchange Co.*, 24 R. I. 50; 52 At. Rep. 122; *Hubener v. Heide*, 73 App. Div. 200; 76 N. Y. Sup. 758; *Hyde v. Mendel*, 75 Conn. 140; 52 At. Rep. 744; *Winkelman v. Colladay*, 88 Ind. 78; 4 Am. Neg. Rep. 645; *Arnold v. Green*, 95 Md. 217; 52 At. Rep. 673. See §§ *ante*, 60-62, 84; *post*, § 146). On the other hand in *Gerlach v. Edelmeyer* (47 N. Y. Super Ct. 292), where a hod-elevating machine was operated under a contract with a builder who was erecting a building and the elevator fell, injuring the plaintiff, the court said: "The elevator was under the management of the defendant's

servant and in the ordinary course of events the accident would not have happened, if the servant had been careful. The happening of the accident, therefore, affords evidence, in the absence of explanation, that the accident happened for want of care." (See Webb's Pollock on Torts, p. 550, n.; and see *Rich v. Pelham Hod Elevating Co.*, 48 N. Y. Sup. 1067; 23 App. Div. 246; *Bogendorfer v. Jacobs*, 89 N. Y. Sup. 1051.

§ 94. *Res ipsa loquitur* — Contractual relation essential. — In the case of *Stackpole v. Wray* (77 N. Y. Sup. 633; 74 App. Div. 310) it appeared that a servant was killed in the fall of an elevator and while it was shown that the fall might have been caused by the breaking of a bolt there was no proof that any defect could have been discovered by inspection. On the subject of *res ipsa loquitur* the court said: "It has always been the law in this State that, to hold an employer liable for an injury to an employee occasioned by the use of machinery furnished by the employer for the use of the employee, the burden is on the employee to establish that the accident which caused the injury was the result of the neglect of the employer to discharge a duty which he owed to his servant, and that in the absence of proof that the machine was an unsafe one, or that the

defendant has been negligent in keeping it in order, the employer is not liable. In this case the plaintiff has failed to prove that the injury was the result of any neglect of the defendant to inspect the machine, or that the defendant failed in the performance of any duty which he owed to his employee, unless by the application of the maxim *res ipsa loquitur* the happening of the accident itself is evidence from which the jury may find negligence. I have been unable to find any case in which a liability has been imposed upon a master by the application of the principle expressed by that maxim. That principle has usually been applied in cases where a contractual relation exists between the persons injured and the person maintaining or using the machinery, as in a case of a common carrier, or where the person injured was in a public street, and was injured by something falling from the adjoining property. In the case of *Griffen v. Manice*, 166 N. Y. 188; 59 N. E. 925; 52 L. R. A. 922; 82 Am. St. Rep. 630, however, the application of this maxim has been extended so that it is not now confined to the cases before mentioned. In that case, which was to recover the damages sustained by the fall of a passenger elevator in an office building to a tenant in the building, it was held that the evidence of the happening of the accident was sufficient to require the sub-

mission of the question of the defendant's negligence to the jury; that 'the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring the existence of the traversable or principal fact in issue, — the defendant's negligence;' that the maxim is also in part based on the consideration that, where the management and control of the thing which has produced the injury or exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produces the accident, which the plaintiff is unable to present."

§ 95. **Violation of statute, prima facie negligence.** — In *Channon Co. v. Hahn* (189 Ill. 28; 59 N. E. Rep. 522; 9 Am. Neg. Rep. 644, note; affg. 90 Ill. App. 256), it was held that where a city ordinance makes it "the duty of every person owning, controlling, operating or using, as owner, lessee or agent, any passenger or freight elevator in any building within the corporate limits, to employ some competent person to take charge of and operate the same, and a breach of this ordinance was alleged and clearly established by the proof, this constituted a *prima facie* case of negligence, if the violation of the municipal law caused or contributed to the injury of the plaintiff in an action by an

employee for injuries received from falling down an elevator shaft improperly left open. (See *Illinois Fuel Co. v. Parsons*, 38 Ill. App. 182. And see, *ante*, § 43.)

§ 96. **Burden of proof.** — In an action for damages because of injury sustained in the operation of an elevator the burden of proof of the defendant's negligence is on the plaintiff. In some of the States the plaintiff is also required to prove himself free from negligence. (See, *ante*, § 66); and, *post*, §§ 168-170.) In *Treadwell v. Whittier* (80 Cal. 582; 5 L. R. A. 498), the court said: "The law requires proof that the plaintiff has sustained an injury by the breaking of the machinery by which he is carried or transported, and that such machinery was under the control and management of the defendant. When plaintiff has made such proof, he has made out a case which entitled him, if not rebutted or disproved, to recover of the defendant. The plaintiff by such proof has made a case showing negligence on the part of the defendant. The burden is then thrown on the defendant to show that he was not guilty of negligence for which he could be charged. This can be done by going into proof of the manner in which the hurt occurred and showing that it was caused by an inevitable causality for which the law imposes on him no responsibility,

or by establishing any fact which relieves him of responsibility.”

## ARTICLE II.

### INJURIES TO PASSENGERS.

§ 97. **Care for passengers' safety.** — As has been above said (*ante*, § 6), carriers of passengers by elevator are bound to exercise the highest degree of human care for the personal safety of the passengers. Every reasonable precaution must be observed by the elevator attendant or attendants in guarding passengers from the dangers usually incident to the use of passenger elevators. (See *Goldsmith v. Holland Building Co.*, 182 Mo. 597; 81 S. W. Rep. 1112; *Franklin Printing and Publishing Co. v. Behrens*, 80 Ill. App. 313; *Oberndorfer v. Pabst*, 100 Wis. 505; 76 N. W. Rep. 338.) To illustrate, in the case of *Mitchell v. Marker* (62 Fed. Rep. 140), it was held to be the duty of the motorman to allow the passengers time to adjust themselves on the car, and obtain their balance before starting swiftly upward (*Russo v. Improvement Assoc.*, 104 La. Ann. 426; 29 So. Rep. 46.)

Again, in *McGrell v. Buffalo Office Bldg. Co.* (70 N. Y. St. Rep. 372), it was held that the conductor on an elevator car, which was

only a platform with side pieces for passengers to hold to, should warn a passenger, who was only nine and a half years of age, how to protect herself, before he started the car upward with its usual rapidity. On account of the peculiar construction of the car the conductor "was aware that the child was likely to lose her equilibrium if he started the car rapidly. He knew, or should have known, that she was to be thrown down on the floor of the car. His observation had taught him that strong adults were liable, as the car starts, to lose their balance, and are frequently compelled to step about in the car to prevent falling."

§ 98. **Care for passengers' safety — Illustrations.**— In *Savage v. Joseph H. Bauland Company*, 58 N. Y. Sup. 1014; 42 App. Div. 285; 6 Am. Neg. Rep. 632), an elevator of standard make, regularly inspected and fully equipped with all the latest safety appliances, containing fifteen or twenty passengers suddenly stopped between the second and third floors and all efforts, by the use of the levers, failed to start the car in either direction. The engineer finally sent his assistant to the top of the elevator shaft with instructions to slacken the ropes controlling the machinery. Control of the car was lost and it fell to the basement seriously injuring the plaintiff.

In sustaining a verdict in favor of the plaintiff the court said: "In the case at bar, the danger to be apprehended, if control of the car was lost, was great. The car was heavily laden with human beings, and was suspended between the second and third floors above the basement. If it fell, and the safety appliances failed to work, there was every reason to believe that many of the passengers would be seriously injured; and the degree of care which the defendant was bound to exercise was measured by the danger which was to be apprehended from the circumstances as they were disclosed to the defendant. We are of opinion that evidence was sufficient to justify the conclusion of the jury, if the law laid down was correct, and upon this point we are satisfied that the learned trial court was not in error. The defendant could not permit the elevator car to get beyond its control, where it had the means and the opportunity of preventing it, under the circumstances of this case, and rely upon its safety appliances to protect the persons in the car. It owed these passengers a higher duty than trying experiments. It should have taken every precaution reasonably possible, and, having failed in this duty, it must answer in damages to those who have suffered through its negligence."



§ 99. **Care for passengers entering and leaving cars.** — Passengers are entitled to a reasonable time in which to enter and leave cars. (*Luckel v. Century Building Co.*, 177 Mo. 608; 76 S. W. Rep. 1035. See *Roulo v. Minot*, 132 Mich. 317; 93 N. W. Rep. 870; 9 Det. Leg. N. 619; *Chicago Exchange Building Co. v. Nelson*, 197 Ill. 334; 65 N. E. Rep. 369, affirming 98 Ill. App. 189; *Ingrafia v. Samuels*, 75 N. Y. Sup. 718; 71 App. Div. 14; *Bullock v. Butler Exchange Co.*, 22 R. I. 105; 46 At. Rep. 273; *Blackwell v. O'Gorman Co.*, 22 R. I. 638; 49 At. Rep. 28; *Gibson v. International Trust Co.*, 177 Mass. 100; 58 N. E. Rep. 278; *Green v. Y. M. C. A.*, 65 Ill. App. 459; *Oberndorfer v. Pabst*, 100 Wis. 505; 77 N. W. Rep. 338; *Zongt v. People's Union Merc. Co.* (Mo. App.), 86 S. W. Rep. 487.)

Opening the door of an elevator constitutes an implied invitation to passengers to enter. (*Bremer v. Pleiss* (Wis.), 98 N. W. Rep. 945; *Tousey v. Roberts*, 114 N. Y. 312; 21 N. E. Rep. 399; 11 Am. St. Rep. 655; *Oberndorfer v. Pabst*, 100 Wis. 506; 76 N. W. Rep. 388; *Roulo v. Minot*, 132 Mich. 317; 93 N. W. Rep. 870; 9 Det. Leg. N. 618.)

In *Becker v. Lincoln Real Estate and Building Co.* (174 Mo. 246; 73 S. W. Rep. 851), *Marshall, J.*, in delivering the opinion of the court, clearly stated the law upon this subject as

follows: \* \* \* "These rules regulating the care to be exercised by railroads in allowing passengers to alight, apply with equal, if not more, reason and force to the running of elevators, for the danger of starting before the passenger has boarded or left an elevator, is even greater than it is of starting a train under similar conditions. \* \* \*

"When any one passenger directs the operator to stop the elevator at a certain floor, it is not necessary for every other passenger who desires to get off at that floor to repeat the direction, but it is the duty of the operator, when so directed by a passenger, to stop at such floor for a length of time sufficient for that passenger and any other passengers who desire to alight at that floor to reasonably do so, and before again starting the elevator it is the duty of the operator to use 'reasonable care to ascertain if there are other persons in the act of getting off.'"

In the case of *Dawson v. Sloan* (100 N. Y. 620; affirming 49 N. Y. Super. Ct. 304), it was held that where a tenant in an apartment-house saw the owner's elevator boy sitting in a nodding position, and the plaintiff, supposing the platform to be in its place but intending to inquire or to stop to examine and see, stepped in and fell to the bottom of the shaft, it was held to be for the jury to decide whether the appearances were such as to throw the plaintiff

off his guard; and, a verdict for the plaintiff was sustained.

§ 100. **Care for passengers entering and leaving cars — Mitchell v. Keene.** — In *Mitchell v. Keene* (87 Hun, 266; 33 N. Y. Sup. 1045), the evidence was that the plaintiff was a messenger boy who came upon the defendant's premises known as the Windermere Hotel. "There was an elevator," said the court "in the building, and upon entering the building the plaintiff went to and stepped into the elevator. The man in charge of the elevator was there; the boy handed him the telegrams and he took them and then handed them back. When he had handed the telegrams back he pulled the rope and let the elevator go up, and it stopped at the third floor. The boy approached the doorway of the elevator and stood with his left foot out waiting for the door to be opened. The elevator man then pulled the rope again, giving no notice to the boy, the elevator went up and the boy's foot was caught between the floor of the elevator and the top of the door of the elevator shaft and injured.

"Upon these facts the jury found a verdict in favor of the plaintiff, and from the judgment thereupon entered and from the order

denying motion for new trial this appeal is taken.

"It is claimed the complaint should have been dismissed because no negligence had been proven against the defendant. It is urged that the stoppage of the elevator by the elevator man without saying anything, or having said a word to intimate that it was the floor at which the plaintiff was to alight, and without opening the door of the elevator shaft, should not and could not have been considered by the plaintiff as an intimation that he had arrived at the floor at which he was to get out of the elevator. We think, however, this is error. There were no other persons in the elevator; the elevator man knew the persons whom the plaintiff desired to see for the purpose of delivering the dispatches; and when he stopped the elevator the plaintiff had a right to assume that he had arrived upon the floor at which he was to alight. It was not negligence upon his part to place himself in a position to leave the elevator as soon as the door of the shaft had been opened. After such stoppage it was the duty of the elevator man, before starting the car again, to see that there was no danger in starting the car, or to give the plaintiff some notice that he had not arrived at his destination. This he utterly failed to do. He started the car, the car itself having no door to protect the parties who were riding

in it; the plaintiff's foot was caught and crushed.

"We think the jury had a right from these facts to infer negligence upon the part of the person in charge of the elevator and a want of negligence upon the part of the plaintiff.

"The judgment and order appealed from should be affirmed, with costs."

§ 101. **Care for passengers entering and leaving cars — *Hawley v. Wright*.** — In the case of *Hawley v. Wright* (34 Nova Scotia, 365), the facts were that the deceased in attempting to leave an electric passenger elevator in the defendant's building, as the boy in charge started it to carry a passenger from the fifth to the sixth floor, was caught between the top of the elevator and the floor, and sustained injuries which resulted in his death. The deceased had called at the building a short time previously, for the purpose of seeing a tenant whose office was on the fifth floor, and, on being informed that the person he desired to see was out, entered the elevator cage, and had made several trips up and down before the accident happened. Immediately prior to the happening of the accident the occupant of an office on the fifth floor rang the bell for the elevator to come up, and as soon as it arrived, stepped in quickly, and asked to be taken down to the third floor. The boy

at once turned the wheel to descend, and attempted to close the door, and, as he did so, the deceased made the attempt to get out. The boy in charge of the elevator had received instructions to close the door before starting the cage, and in this case attempted to do so, simultaneously with turning the wheel to cause the cage to descend.

The jury found, in answer to questions submitted, (1) that the accident was due to the carelessness of the deceased in attempting to get out when he did, and (2) that the boy in charge of the elevator could not at the time have done more than he did to prevent the accident.

**§ 102. Motorman's duty to announce floors. —** It is the duty of the attendant operating the elevator to in some way indicate the arrival of the car at the floor number requested by passengers. This may be done by calling the numbers or in less formal methods. Thus, in *Mitchell v. Keane* (87 N. Y. 266; 33 N. Y. Sup. Rep. 1045; 67 N. Y. St. Rep. 731), the plaintiff, having some telegrams to deliver in the defendant's building, entered the elevator and showed the telegrams to the motorman, who took them, looked at them, handed them back and started the elevator upward, stopping at the third floor. The plaintiff approached the elevator door, put

out his foot and waited for it to be opened, when the motorman started the elevator again without notice to the plaintiff, whose foot was crushed by being caught in the top of the door. It was held that the evidence was sufficient to sustain a verdict for the plaintiff.

The court in reviewing this point said: "It is claimed that the complaint should have been dismissed because no negligence had been proved against the defendant. It is urged that the stoppage of the elevator by the elevator man without saying, or having said a word to intimate that it was the floor at which the plaintiff was to alight, and without opening the door of the elevator shaft, should not and could not have been considered by the plaintiff as an intimation that he had arrived at the floor at which he was to get out of the elevator. We think, however, this error. There was no other person in the elevator; the elevator man knew the person whom the plaintiff desired to see for the purpose of delivering the dispatches; and when he stopped the elevator the plaintiff had a right to assume that he had arrived at the floor upon which he was to alight. It was not negligence upon his part to place himself in a position to leave the elevator as soon as the door of the shaft should be opened. After such stoppage it was the duty of the elevator man, before starting the car again, to see that there was no

danger in starting the car, or to give the plaintiff some notice that he had not arrived at his destination. This he utterly failed to do."

§ 103. **Operator's duty to guard open entrance.** — In *Morrison v. Metropolitan Tel. Co.* (52 N. Y. St. Rep. 601; 69 Hun, 100), the plaintiff brought suit upon these facts: With the exception of some electric apparatus the elevator in the defendant's building was in good order, and was just starting upward when plaintiff's intestate, who was a letter carrier, rushed to the door and crowded past a man who stood at the open door to pass in tools and guard the entrance, but who gave no warning or obstruction to the deceased. It was held, that it could not be said, as a matter of law, that the deceased had not a right to rely on the appearance presented, the court saying: "The deceased man was doubtless in haste, all are in haste at mid-day in that great city, and it is assumed to be no uncommon sight to see persons around the door of an elevator. It is not supposed to be a place of danger to be approached with caution and if persons are standing at the door it would be no unnatural assumption to assume that they were either there for no purpose or were going in or coming out."

An operator of an elevator in a department store who started the elevator upward without



closing the door was grossly negligent and the employer liable for an injury to a small boy who attempted to leave the elevator. (*Hayes v. Pitts-Kimball Co.*, 183 Mass. 262; 67 N. E. Rep. 249.)

§ 104. **Passenger's contributory negligence.** — Contributory negligence by the passenger bars his right to recover damages for any injury. This is an absolute rule of law and the only questions which can arise under it are what facts are sufficient to constitute contributory negligence. (See, *post*, §§ 123-128.)

There are already many cases, several of which are here briefly digested as far as they relate to this special object. Where the door of an elevator was thrown open by a boy who was accustomed to throw it open, it was not as a matter of law, contributory negligence in the plaintiff to pass through the door without stopping to look and listen. "An elevator for the carriage of persons is not like a railroad crossing at a highway, supposed to be a place of danger, to be approached with great caution; but on the contrary, it may be assumed that when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen or make a special examination." (*Tousey v. Roberts*, 114 N. Y. 318; 21 N. E. Rep. 399. See *Massey v. Seller*

(Oreg.), 77 Pac. Rep. 397; *Burgess v. Stowe*, 134 Mich. 204; 96 N. W. Rep. 29; 10 Det. Leg. N., 434; *Brenner v. Pleiss*, 121 Wis. 61; 98 N. W. Rep. 945; *Oberndorfer v. Pabst*, 100 Wis. 505; 76 N. W. Rep. 388; *Morman v. Rochester Mach. Screw. Co.*, 65 N. Y. Sup. 969; 53 App. Div. 497; *Colorado Mortgage & Investment Co. v. Rees*, 21 Colo. 435. And see *Whittaker's Smith on Neg.* (2d ed.), p. 483, n.)

Where a person recklessly puts his head in an exposed well-hole, he cannot recover, and the fact that the elevator boy failed to sound a whistle, which he carried, to warn passengers of his descent, is not negligence. (*Mau v. Morse*, 3 Colo. App. 359.)

In *Guichard v. New* (84 Hun, 54; 31 N. Y. Sup. 1080, reversing *s. c.* 65 N. Y. St. Rep. 20), it was held to be a question for the jury, whether a child of eight and a half years of age is guilty of contributory negligence in thrusting its head into an elevator shaft.

In *Cole v. German Savings and Loan Soc.*, (124 Fed. Rep. 113; 59 C. C. A. 593; 63 L. R. A. 416) the facts were that a lady thirty-two years of age on a bright day entered the hallway of an office building for the purpose of riding to an upper story on the elevator about forty feet from the entrance. The door of the elevator shaft was opened by a trespassing boy

and the lady walked into the open shaft, fell below and was injured. It was held that she was guilty of contributory negligence and could not recover. The intervention of the trespassing boy could not have been foreseen as a probable cause of an injury and was direct as to him but remote as to defendant. (See *Rhodus v. Johnson*, 24 Ind. App. 402; 56 N. E. Rep. 942.)

A person who steps into the open door of an elevator apparently at rest, when he has no reason to suppose that it can be started until the invitation of the open door is withdrawn, is not negligent, though he does not carefully examine the apparatus and though a servant's delay might develop the fact that it had actually begun to move. (*Blackwell v. O'Gorman Co.*, 22 R. I. 638; 49 At. Rep. 28.)

But one who steps upon a moving elevator is guilty of contributory negligence. *Green v. Y. M. C. A.*, 65 Ill. App. 459; *Block v. Swift & Co.*, 161 Ill. 107; 43 N. E. Rep. 591; affirming 58 Ill. App. 354.)

In *Western Union Telegraph Co. v. Woods*, (88 Ill. App. 375) where a messenger boy in riding upward in appellant's elevator allowed his thumb to pass through the grill work of the elevator cage so that it was so badly injured that its amputation became necessary, a judgment for \$2,000 in favor of the boy was re-

versed. (See *Sullivan v. Lally*, 166 Mass. 265; 44 N. E. Rep. 221.)

A passenger riding upon a freight elevator is ordinarily guilty of contributory negligence. (*Knox v. Hall Steam Power Co.*, 69 Hun, 231; 53 N. Y. Sup. 39; 30 Abb. N. Cas. 152; 23 N. Y. Sup. 490.)

§ 105. **Passenger's contributory negligence — Minors.** — A fifteen-year-old boy, who was familiar with the elevator, stairs and halls of an apartment hotel where he was accustomed to deliver goods to various tenants, went to deliver goods to certain tenants. The elevator was in two parts, the upper part being for passengers and opening into the front halls only, the lower part was a freight box with no door but with openings and a sliding door to the elevator well opened on the inside from the elevator. In going up passengers were delivered at the first floor, and at the first suit the boy being informed by the motorman that this was the floor he wanted, got off, leaving goods for other tenants in the freight box. Leaving the door in the elevator well open he delivered the goods about five feet away, and turning back, thinking that the elevator was still there but without looking to see, it being quite dark, he stepped into the open door and fell to the bottom of the well and was injured. It was held that he could not

recover for the injuries received (*Ballou v. Callamore*, 160 Mass. 246).

Where a boy under seven years of age, at the invitation of a boy operating the defendant's passenger elevator in a hotel, placed himself on the elevator floor with his back close to the door, and, on turning, when addressed by the elevator boy, his foot was caught between the elevator door and the joists and crushed, it was held that a verdict for the plaintiff should be sustained; and that it is proper to charge that the plaintiff was not guilty of contributory negligence, unless he failed to exercise that degree of care for his safety which "ordinarily careful and prudent children of his age and experience are accustomed to observe under the same or similar circumstances." (*Kentucky Hotel Co. v. Camp* (Ky.), 30 S. W. Rep. 1010.)

### ARTICLE III.

#### INJURIES TO EMPLOYEES.

§ 106. **Relation of master and servant.** — The master owes to his servants several duties; some of which are different from and others higher than duties owing to others. In some cases it is therefore material to determine whether the relation between the parties was that of master and servant or some other relation. (See Bul-

lock v. Butler Exchange Co., 24 R. I. 50; 52 At. Rep. 122; Bigley v. United States, 103 Fed. Rep. 597; Harner v. Reed Apartment Co., 68 N. J. L. 332; 53 At. Rep. 402; Stewart v. Harvard College, 12 Allen, 58; Sellers v. Dempsey, 26 App. Div. (N. Y.) 22. And see, *ante*, §§ 23-29.)

Thus, in *McDonough v. Lanpher* (55 Minn. 503; 57 N. W. Rep. 153; 43 Am. St. Rep. 541), after considering this subject the court finds that the plaintiff who was injured by an elevator was an employee and not merely a passenger. And, in the case of *Baltimore Boot and Shoe Co. v. Jarmar* (93 Ind. 404; 49 At. Rep. 847), it was held that an employer of convicts, under a contract with the State, is liable for an injury to one of the convicts inflicted by a freight elevator in the building. In concluding their opinion the court said: "In our opinion the legal principles applicable to such cases require that the contractor should be held to the master's liability to the convict whose labor he uses, in respect to those incidents of the employment over which he has the same measure of control that a master ordinarily has, but not as to those features of the employment over which he is essentially deprived of such control."

Where a servant of a transfer company had been in the habit for years of delivering goods on the platform of an elevator on the inner part

of a sidewalk, and in doing so on one occasion broke a plate-glass window, the act was held to be within the course of his employment and the transfer company liable to the owner (but not the tenant) of the premises. (*Ridge v. Transfer Co.*, 56 Mo. App, 133.

§ 107. **Relation of master and servant — Sweeney v. Rozell.** — The case of *Sweeney v. Rozell* (64 N. Y. Sup. 721; 31 Misc. Rep. 640), was an appeal by the defendant below from a judgment for the plaintiff. It appears that the plaintiff was in the employ of one Gibson, the proprietor of a sales stable. The defendant sold Gibson a truck load of hay in bales. It was his custom to send with each truck ropes and pulleys for the use of the purchaser in stowing the hay in his loft. Such appliances were sent with the load of hay to Gibson. While the plaintiff and two other men, all employees of Gibson but not of the defendant, were hoisting the bales of hay, one of the bales fell by reason of the breaking of one of the smaller ropes and the plaintiff received the injuries for which he sued.

In reversing the judgment and ordering a new trial, the court said: "The plaintiff was not the servant of the defendant, and there was no contractual relation between them. The evidence clearly shows, however, that the defendant

furnished the hoisting appliances for use in stowing away hay; that he intended and expected them to be used for that purpose; and that he knew or at least he had reason to expect, that they would be so used by Gibson's employees. It was therefore his duty to use the same degree of care in providing safe and proper appliances for the purpose intended, as it would have been his duty to use if he had been providing the appliance for the use of his own servants, and if he failed in this duty a cause of action arose in behalf of the plaintiff. *Devlin v. Smith*, 89 N. Y. 470; *Davis v. Elevator Co.*, 65 Hun, 573; 20 N. Y. Supp. 523. The duty thus assumed by the defendant was not, however, that of an insurer of the safety of every person using the hoisting appliances. He did not undertake absolutely for the safety and sufficiency of the implements which he furnished, but only for the exercise of reasonable care in that respect, and, in order to render him liable for the result of the accident, it is not sufficient to show that the rope which broke was frayed or imperfect, but it must also appear that the defendant knew, or should have known, of its defective condition, or that he had omitted to use reasonable care to discover its condition; for his personal negligence is the very gist of the action."



§ 108. **Duty to warn and protect.** — It is the duty of operators of elevators to duly instruct employees working either on or about their elevators so that such employees may have a reasonable opportunity of knowing the risks and dangers of their employment. It is the duty of each employer to specially warn those in his employment of any risks or dangers peculiar to the elevator or elevators on which or about which they are employed (*Connors v. Morton*, 160 Mass. 333; *Tvedt v. Wheeler*, 70 Minn. 161; 22 N. W. Rep. 1062; *Lowry v. Anderson*, 89 N. Y. Sup. 107; 98 N. W. Rep. 945; *Bauer v. American Car & Foundry Co.*, 132 Mich. 537; 94 N. W. Rep. 9; 10 Det. Leg. N. 17; *Slack v. Harris*, 200 Ill. 96; 65 N. E. Rep. 669, affirming 101 Ill. App. 669; *Westbrook v. Crowdus* (Tex. Civ. App.), 58 S. W. Rep. 195; *Nyback v. Champagne Lumber Co.*, 109 Fed. Rep. 732; 48 C. C. A. 632.) However, should an employee have all the knowledge both general and special, which employers are ordinarily required to impart, this is sufficient and the employer is not required to give him the usual notices and instructions (see *Hart v. Naumburg*, 123 N. Y. 641; 25 N. E. Rep. 385; reversing 3 N. Y. Sup. 227). It is the duty of the operator of an elevator to use due care to protect the employees against injury from defects in the machinery, to promptly

repair discovered defects, to employ careful persons to work on or near to elevators and to use care for the protection of repairers while at work (*Donovan v. Gay*, 100 Mo. 440; 11 S. W. Rep. 44; *Perras v. Booth*, 82 Min. 192; 84 N. W. Rep. 739; 85 N. W. Rep. 179; *Holmes v. Junod*, 68 Fed. Rep. 858; 30 U. S. App. 379; 16 C. C. A. 36; *Donovan v. Gay*, 97 Mo. 440; *Mann v. O'Sullivan*, 126 Cal. 61; 6 Am. Neg. Rep. 417; *Harmer v. Reed Apartment Co.*, 68 N. J. L. 332; 53 At. Rep. 402; *Hall v. Poole*, 94 Md. 171; 50 At. Rep. 703; *Boyd v. Blumenthall*, 3 Pennewill, Del. Rep. 567; 52 At. Rep. 330; *Schmidt v. Metropolitan Life Insurance Co.*, 43 N. Y. Sup. 318; 13 App. Div. 120).

§ 109. **Duty to warn and protect — illustrations.** — In *Chicago & Grand Trunk Ry. Co. v. Spurney* (69 Ill. App. 549; 2 Am. Neg. Rep. 505), the court reversed a judgment for the plaintiff rendered on the following facts: "This was an action to recover for personal injuries said to have been caused by the negligence of appellant.

"Appellee was employed by appellant to work about the grain elevator; his business seems to have been to shovel grain out of the cars into a 'tank,' from whence an elevator took the grain up.

" Upon the day of the accident, appellee upon his arrival at the elevator, saw that the elevator machinery was not in operation, and that a portion of a rope which passed over a shaft was, while not detached from the shaft, so unwound as to lie on the floor. Appellee endeavored, as he says, to get the rope in shape, and in so doing stepped into the rope, and the machinery starting without the customary signal, the rope was wound up and catching him around the leg, he was so injured that the amputation of his leg became necessary.

" The first amputation below the knee was afterwards followed by a second amputation between the thigh and the knee.

" The jury returned a verdict for the plaintiff for \$25,000.00. Upon a remittitur of \$10,000.00, judgment for \$15,000.00 was entered."

Where necessary, employers should provide a sufficient number of employees to give warnings where cotton is being thrown into hatchways. (Ocean S. S. Co. v. Cheeney, 95 Ga. 381; 22 S. E. 544, affirming 92 Ga. 726; 19 S. E. 33; 44 Am. St. Rep. 113.)

**§ 110. Duty to employ competent servants. —**  
The master is required to employ servants whose fitness and competency are commensurate with the risks and dangers of the employment. The master owes this duty to passengers lawfully

upon elevators and to servants. (See *ante*, § 72 *et seq.* And see *Gunn v. Willingham*, 111 Ga. 427; 36 S. E. Rep. 804; *McAndrews v. Burns*, 39 N. J. L. 118; *Couch v. Watson Coal Co.*, 46 Iowa, 17.)

Thus, in *Nutzmann v. Germania Life Insurance Co.* (78 Minn. 505; 81 N. W. Rep. 518; 82 Minn. 116; 84 N. W. Rep. 730), the court said, upon this subject: —

“ If the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of want of the requisite skill to discharge the duties which he is employed to perform, or for any other cause, is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant, unless the person injured had notice of the incompetency, or had equal opportunities with the employer to obtain notice.”

In *Grams v. C. Reiss Coal Co.* ( Wis. ), 102 N. W. Rep. 586), it was held that the defendant coal company was not liable for the death of an employee struck by a coal bucket which was being raised by a derrick, where the persons employed to operate the

derrick had been employed at similar work for a number of years and were otherwise competent.

On the question of competency of an employee expert testimony may be admitted. (*Nutzmann v. Germania Life Insurance Co.*, 78 Minn. 505; 81 N. W. Rep. 518; 82 Minn. 116; 84 N. W. Rep. 730; *Couch v. Watson Coal Co.*, 46 Iowa, 17.)

A city ordinance requiring persons owning elevators to "employ some competent person to take charge of and operate the same" is merely declaratory of the common law duty. (*Wolcott v. Studebaker*, 34 Fed. Rep. 8.)

§ 111. **Incompetent or negligent instructor.** — In the case of *Brennan v. Gordon* (118 N. Y. 489; 23 N. E. Rep. 810; 16 Am. St. Rep. 775; 8 L. R. A. 818, reversing 14 Daly, 47) the material facts were briefly that the plaintiff was an inexperienced operator in charge of an elevator under the directions of an instructor furnished by the defendant, who was the proprietor of the elevator. The elevator was stopped to take off freight "and while this was being done the elevator was either started by somebody, the evidence leaving it in some doubt who that person was, or was started without anyone's interference from some inherent defect in the machinery; and while thus moving up the upper end of the beam came in collision

with the roof, which caused the cogs of the wheel upon the apparatus, one or more of them, to break, and thereby the elevator fell to the bottom with the plaintiff in the car, and by means of which the plaintiff was seriously injured." Potter, J., in delivering the opinion of the court, said: "The plaintiff was entitled to have, and the defendants were bound to provide him with, an instructor competent to teach the art of managing an elevator, regardless of the competency of the defendants in that respect, and of which there was no proof whatever in the case. But the defendants were not only bound to furnish plaintiff with an instructor absolutely competent to manage an elevator, but the defendants were also bound to provide such an instructor for a reasonable length of time to teach the plaintiff how to manage the elevator, and that the instructor should be guilty of no negligence to the injury of the plaintiff while he was being instructed. These relations spring from the fact that during this period the instructor is doing the work, and standing in the place of the defendants, the master."

**§ 112. Duty of employer to furnish safe machinery.** — The duty of operators of elevators to furnish their employees with suitable and safe appliances to be used in the course of their employment (see, *ante*, §§ 15 *et seq.*) is

well stated by the court, in the case of *Burns v. Sennett & Miller* (97 Cal. 363), as follows: "The general rule is that an employer must furnish machinery and appliances reasonably suitable and safe for the employee to do his work. In such a case the employer is, of course, not bound to insure the employee against any defect in such appliances; but he is bound to use reasonable care in their selection and construction. And where that rule applies, the duty to furnish such machinery and appliances is one which the employer owes personally to the employed; and he cannot escape that duty by trusting it to an employee who negligently performs it." (See *Donovan v. Gay*, 100 Mo. 440; 11 S. W. Rep. 44; *Larkin v. Washington Mills Co.*, 61 N. Y. Sup. 93; 45 App. Div. 6, distinguishing *McCarthy v. Washburn*, 58 N. Y. Sup. 1125; 42 App. Div. 252; *Perras v. Booth*, 82 Minn. 192; 84 N. W. Rep. 739; 85 N. W. Rep. 179; *Robinson v. Pittsburg Coal Co.*, 129 Fed. Rep. 324; 63 C. C. A. 258; *Boardman v. Brown*, 44 Hun, 336; *Skelley v. Crutchfield*, 17 Pa. Super Ct. 198; *Leonard v. Herrmann*, 195 Pa. St. 222; 45 At. Rep. 723; *McGuigan v. Beatty*, 186 Pa. St. 329; 42 W. N. C. 277; 40 At. Rep. 490; *Ashley Wire Co. v. Mercier*, 68 Ill. App. 485; *The King Gruffyeld*, 131 Fed. Rep. 189;

Rincicotti v. John J. O'Brien Contracting Co., ( Conn. ), 60 At. Rep. 115; Dervin v. Herman, 55 N. Y. Sup. Ct. 275; Scandell v. Columbia Construction Co., 64 N. Y. Sup. 232; 50 App. Div. 512; Continental Tobacco Co. v. Knoop, 24 Ky. Law Rep. 1268; 71 S. W. Rep. 3; Mulvey v. R. I. Locomotive Works, 14 R. I. 204; Atlanta Cotton Factory Co. v. Speer, 69 Ga. 137; 47 Am. Rep. 750; Wagner v. New York, C. & St. L. R. Co., 78 N. Y. Sup. 696; 76 App. Div. 552; White v. Eidlidz, 46 N. Y. Sup. 184; 19 App. Div. 256. And see McKinney on Fellow-Servants, pages 90, 91, 124, 323; Thompson on Negligence, §§ 3895 *et seq.*)

If the servant uses the apparatus for a purpose not intended by the master, the master is not liable for a resulting injury to the servant. (Morrison v. Burgess Sulphite-Fibre Co., 70 N. H. 406; 47 At. Rep. 413.)

In Leonard v. Herrmann (195 Pa. St. 222; 45 At. Rep. 723), the plaintiff was employed by the defendant in operating a freight elevator, of the kind in ordinary use but without a guard rail. The court below gave binding instructions for the defendant, from which the plaintiff appealed. In delivering the opinion of the court Mr. Justice Fell said: "An employer is under an obligation to his employee to furnish reasonably safe



machinery and appliances, but it is not in every case for a jury to determine the standard of safety. If it were, there would be no means by which an employer could protect himself, as his judgment founded on his experience or the advice of those best able to advise him would be subject to review by others often utterly incompetent to form any intelligent opinion of the matter. The legal test of reasonable safety in machinery or methods is ordinary use, and a jury cannot be permitted to set up any other. The rule and the reasons on which it is founded are clearly stated by our Brother Mitchell in *Titus v. R. R. Co.*, 136 Pa. 618, as follows: 'Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; but the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability may be imposed.' "

§ 113. **Duty of employer to furnish safe machinery — Leonard v. Kinnare.** — In *Leonard v. Kinnare* (174 Ill. 532; 51 N. E. Rep. 688, affg. 75 Ill. Ap. 145), the material facts were that the appellant was a contractor engaged in erecting a smoke-stack made of sheet iron. The stack was made in sections which were being hoisted by rope and tackle and then riveted together. While the employees of the contractor were at work a shutter fell from the building, against the side of which the stack was being constructed, and struck one of the employees, causing his death, whose administrator is the appellee.

In sustaining a judgment against the contractor the court said: "As has been seen, it was the duty of the defendant to use reasonable care and diligence in providing appliances where the deceased was required to labor, and while the deceased was bound to take notice of defects which were patent, he was not required to make an examination for defects and he might properly act on the presumption that the master had used reasonable care in placing the tackle for his work so as to make it reasonably safe. (*Hines Lumber Co. v. Ligas*, 172 Ill. 315.) It nowhere appears that the deceased had any knowledge of the defective or dangerous construction of the tackle.

"It is, however, said that the deceased and the

two men using and operating the tackle at the same time were fellow-servants. Conceding that the deceased and those with whom he was working at the time of the injury were fellow-servants, including Gow, who had charge of erecting the tackle, that has no bearing on the case. Here the injury resulting in the death of the deceased did not arise from any negligent act of the men in operating the rope and tackle at the time the deceased was struck and killed by the falling shutter, but the negligence relied upon was that the block and tackle were not properly constructed by the defendant's foreman. The duty of the master to exercise reasonable care in providing safe instrumentalities where servants are required to work is a positive obligation towards the servant, and the master is liable for any failure to discharge that duty, whether he undertakes that performance personally or through another servant. *Hess v. Rosenthal*, 160 Ill. 64; *Chicago, Burlington and Quincy Railroad Co. v. Avery*, 109 *Id.* 314; *Chicago and Alton Railroad Co. v. Scanlan*, 170 *Id.* 106."

§ 114. **Master not an insurer.** — As above seen (*ante*, §§ 51, 75) the master is not an absolute insurer of the personal safety of his servants. (*Slater v. Jewett*, 85 N. Y. 61; 39 Am. Rep. 629; *Pfeiffer v. Ringler*, 12 Daly, 437.)

The master is not bound to furnish the best known appliances (*Burke v. Witherbee*, 98 N. Y. 562); nor the latest patterns of the most improved kind. (*Boyd v. Blumenthal*, 3 Pennewill, Del. Rep. 567; 52 At. Rep. 330.)

**§ 115. Employer's duty to furnish safe place, limited to his own premises.** — The duty of the employer to provide a safe place for his employees to work does not include the premises of others to which employees may go and temporarily work. (*Whallon v. Sprague Electric Elevator Co.*, 37 N. Y. Sup. 174; 1 App. Div. 264; 72 N. Y. St. Rep. 519.)

The fact that a laborer suffered an injury on the premises where he was employed, but outside the regular working hours, does not deprive him of the right to sue his employer therefor. (*Broderick v. Detroit Union Depot Co.*, 56 Mich. 261; 22 N. W. Rep. 802.)

**§ 116. Employee's assumption of risk.** — An employee assumes the ordinary risks incident to the employment of which he has knowledge or to which his attention has been called or which are apparent. (*Larkin v. Washington Mills Co.*, 61 N. Y. Sup. 93; 45 App. Div. 6, distinguishing *McCarthy v. Washburn*, 58 N. Y. Sup. 1125; 42 App. Div. 252; *Olson v. Hanford Produce Co.*, 111 Iowa, 348; 82 N. W.

Rep. 903; *Holmes v. Junod*, 68 Fed. Rep. 858; 30 U. S. App. 379; 16 C. C. A. 36; *Karch v. Kipp*, 90 N. Y. Sup. 404; *Horton v. Ft. Worth Packing and Provision Co.* (Tex. Civ. App.), 76 S. W. Rep. 211; *Sauls v. Railway* (Tex. Civ. App.), 81 S. W. Rep. 89; *Bauer v. American Car and Foundry Co.*, 132 Mich. 537; 94 N. W. Rep. 9; 10 Det. Leg. N. 17; *Middendorf v. Schulze*, 105 Ill. App. 221; *Boyd v. Blumenthal*, 3 Pennewill, Del. Rep. 567; 52 At. Rep. 330; *Bays v. Warren Featherbone Co.*, 131 Mich. 205; 91 N. W. Rep. 164; *Sullivan v. Thorndike Co.*, 175 Mass. 41; 56 N. E. Rep. 600; *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226; 60 N. E. Rep. 815, affirming 90 Ill. App. 49; *Hoard v. Blackstone Manufacturing Co.*, 177 Mass. 69; 58 N. E. Rep. 180; *Gunn v. Willingham*, 111 Ga. 427; 36 S. E. Rep. 804; *Nelson v. Sanford Mills*, 89 Me. 219; 36 At. Rep. 79; *Watson v. Duncan*, 61 N. Y. Sup. 667; 46 App. Div. 298; *Sunney v. Holt*, 15 Fed. Rep. 880; *Reichert v. Buffalo Spring and Gear Co.*, 15 N. Y. Misc. Rep. 222; *Bair v. Heibel*, 103 Mo. App. 621; 77 S. W. Rep. 1017; *Moran v. Harris*, 63 Iowa, 390; *Pardridge v. Gillbride*, 98 Ill. App. 134; *Stover Mfg. Co. v. Millane*, 89 Ill. App. 532; *Juchotz v. Michigan Alkali Co.*, 120 Mich. 654; 79 N. W. Rep. 907; 7 Det. Leg. N. 297; *Walters v. George A. Fuller Co.*, 77 N. Y.

Sup. 681; 74 App. Div. 388. And see Harris' Damages by Corporations, pages 326, 1136; Wood's Law of Master and Servant, pages 681 *et seq.*; Thompson on Neg., § 4802.)

As said by the court in *Quick v. Minnesota I. Co.* (47 Minn. 361; 50 N. W. Rep. 244; followed in *Perras v. Booth*, 82 Minn. 192; 84 N. W. Rep. 739; 85 N. W. Rep. 179): "A servant is held ordinarily to assume such risks and dangers as are incident to the work or business engaged in, provided he knows and appreciates such risks and dangers; and he is held to know such as are manifest to one of ordinary common sense and observation, or which by the prudent exercise of the senses may be perceived and appreciated." (See *Partlett v. Dunn* (Va.), 46 S. E. Rep. 467.)

**§ 117. Employee's assumption of risk — Illustrations.** — Where a boy, sixteen years of age, was killed by being drawn by the cable of an elevator against the drum on which the cable was wound, and there was evidence that the drum and cable were near the edge of the elevator platform as it passed up and down, and that the drum was uncovered in violation of a State law upon the subject, it was held that it was not material error that an expert testified that the drum should have been covered, since the statute required this, and that the boy did

not assume the risk of danger from the proximity of the drum and cable. (Thompson v. Johnston, 86 Wis. 576.)

Where it was the custom in a store building having an elevator running from the basement to the second floor for any of the employees, without the ringing of a bell, to move same at his own convenience by pulling a rope, an employee, whose business it was to make use of such elevator, must be held as having assumed the risk of his employment, and where, when engaged on one floor in loading the elevator, he backed into the open shaft and fell to the basement by reason of the elevator having been moved without warning by another employee, he cannot recover for his injuries. (Danuser v. Seller, 24 Wash. 565; 24 Pac. Rep. 783.)

An employee's notice of defects does not necessarily charge him with notice of the dangers thereof, for these should be made known to him by the employer. (Union Show Case Co. v. Blindauer, 75 Ill. App. 358, affirmed in 175 Ill. 325; 51 N. E. Rep. 709.)

An employee who has knowledge of a danger cannot, on the ground of his youth, complain of his employer's failure to warn him. (Connell v. Miller, etc, Co. (Super. Ct. Cin.), 19 Wkly. Law Bul. 22.)

In the case of Reichert v. Buffalo Spring and Gear Company (36 N. Y. Sup. 402; 15 Misc.

Rep. 222), the facts were that the plaintiff was the operator of an elevator with automatic sliding doors which got out of order on the morning of the accident, but after calling the attention of the man fixing the doors to the fact that they were not right, he continued to use the elevator. In the afternoon an employee on an upper floor desiring to send a truck load of material to the floor below, and seeing the doors of the elevator open supposed the elevator was there and rolled the truck and load into the open shaft which material fell upon and injured the plaintiff upon the elevator below. In holding the plaintiff guilty of contributory negligence, the court said: "In such cases the servant assumes the risk of his employment, and, if he is willing to use defective machinery, knowing it to be such, he cannot recover, because his own negligence and want of care are the cause of the injury."

**§ 118. Employee's assumption of risk — Illustrations — Continued.** — Where for more than two years, one of the duties of an employee was to sweep out the bottom of an elevator shaft and he was injured by the descending car of the elevator, while in the performance of this duty, the court refused his administratrix the right to recover damages. (*Volk v. Sturdevant*, 104 Fed. Rep. 276; 43 C. C. A. 527; affirming



99 Fed. Rep. 332; 39 C. C. A. 646). The court in delivering its opinion through Putnam, Circuit Judge, said: "The proofs show no condition of affairs leading up to his injury which was not within the observation and apprehension of any man of ordinary understanding. It also appears that the elevator car and its appurtenances, and the manner in which it was operated, were, at the time he was injured, in all respects the same as they had been during the time that Esch had been employed as cleaner and sweeper, and that there were no circumstances which prevented Esch from fully observing the conditions as they existed at the time of the injury, and had existed. Therefore the case comes plainly within the rules with reference to the assumption of risks by employees, of which a late statement is in *Railway Co. v. Archibald*, 170 U. S. 665, 672, 673; 18 Sup. Ct. 777; 42 L. Ed. 1188."

One whose business is to pass over the stage plank of a steamboat takes the risk of the custom on the Mississippi river of running the bow of the boat into the shore and holding in position by the revolutions of the wheel while delivering small quantities of freight. (*Red River Line v. Cheatham*, 60 Fed. Rep. 517; 9 C. C. A. 124; 23 U. S. App. 19.)

An employee assisting in the construction of a building assumes the risk of a derrick of

the kind generally used for the purpose, although it may be in fact too light to accomplish the work which was attempted to be done with it. (*Rosa v. Volkening*, 72 N. Y. Sup. 236; 64 App. Div. 426.)

§ 119. **Employee's assumption of risk, depends upon employer having done his duty.** — The rule of liability stated in the last preceding section presupposes that the master has done those duties required of him by law (*Slack v. Harris*, 200 Ill. 96; 65 N. E. Rep. 669, affirming 101 Ill. App. 669), for the servant does not assume risks of the master's negligence (*McGregor v. Reid*, 178 Ill. 464; 6 Am. Neg. Rep. 28; 53 N. E. Rep. 323, reversing 76 Ill. App. 610. See *Harris' Damage by Corporations*, page 1136, citing *Moran v. Harris*, 63 Iowa, 390). Thus, in *Ambrose v. Angus* (61 Ill. App. 304), where an employer is charged with providing for the use of the employer "a defective derrick, having insufficient, weak and unsafe wires, pulleys and brads," the court quoted with apparent approbation from the opinion of the court in *Pennsylvania Coal Co. v. Keene* (54 Ill. App. 622), as follows: "The master is bound to use reasonable care in providing reasonably safe machinery, appliances, surroundings, etc., and the servant, in the absence of notice that the machinery, etc., is unsafe or defective, has a right to rely

upon the discharge by the master of his duty in respect to those things."

Acting under the direct orders of the master the servant may use an elevator which is in an unusually unsafe condition without assuming the risks thereof, provided its condition was not such as to shock his sense of prudence. (*Dallemand v. Saalfeldt*, 175 Ill. 310; 51 N. E. Rep. 645; 17 Nat. Corp'n Rep. 439, affirming 73 Ill. App. 151; 15 Nat. Corp'n Rep. 698. But see *Kueckel v. O'Connor*, 76 N. Y. Sup. 829, affirming 73 N. Y. Sup. 546; 36 Misc. Rep. 335; *Union Show Case Co. v. Blindauer*, 75 Ill. App. 358; affirmed in 175 Ill. 325; 51 N. E. Rep. 709.)

So where a servant continues to use defective apparatus after the promise of the master to repair them he does so at the master's risk (*Boyd v. Blumenthal*, 3 Pennewill, Del. Rep. 567; 52 At. Rep. 330), or that it is safe enough to use the balance of the season (*Stomne v. Hanford Produce Co.*, 108 Iowa, 137; 78 N. W. Rep. 841).

Although the employer may be guilty of some degree of negligence, if the employee by his own foolhardy conduct brings on the injury he cannot successfully sue his employer therefor. (*Nelson v. Sanford Mills*, 89 Me. 219; 36 At. Rep. 79.)

If the master willfully violates his duty and a servant is injured the latter may recover, although

guilty of slight negligence. Thus, a servant has a cause of action where he was injured by a lump of coal falling upon him while upon an uncovered hoist willfully used by the owner in violation of the statute. (Litchfield Coal Co. v. Taylor, 81 Ill. 590, cited in Harris' Damages by Corporations, pages 1139, 1140.)

§ 120. **Knowledge of defects.** — As heretofore seen (*ante*, § 30), if impairment of the elevator occur during the course of its operation the employer, to be liable, must have actual knowledge of the fact or a reasonable opportunity for discovering it and the employee ignorant of its existence. (See *Horton v. Ft. Worth Packing and Provision Co.* (Tex. Civ. App.), 76 S. W. Rep. 211; *Ford v. Crigler*, 25 Ky. Law Rep. 56; 74 S. W. Rep. 661; *Jacobson v. Smith*, 123 Iowa, 263; 98 N. W. Rep. 773; *Durell v. Hartwell*, 26 R. I. 125; 58 At. Rep. 448.) A specialist in the business of making and repairing elevators, who had opportunity to examine an elevator before using it, and in fact made some examination, cannot recover damages for injuries incurred in attempting to operate. (*Watson v. Durean*, 62 N. Y. Sup. 257; 47 App. Div. 640).

Thus, where an employee is familiar with the construction and use of a freight elevator and knows that a weight placed upon the car will

cause it to descend, unless the brake is set according to the weight and locked, it is his duty to see that the brake is properly set and locked before using the elevator (*Robinson v. Wright*, 94 Mich. 283).

In *O'Brien v. Sanford* (22 Ontario Rep. 136), a twelve-year-old boy was employed to run an elevator in a factory. The elevator was worked by ropes on the outside of the cab which were handled by the person within through an opening in the side of the cab. He was instructed for a few days by a bigger boy, but was not cautioned not to put his head out of the opening when the elevator was going. On the occasion in question the elevator stopped when going up, which it had often done before, but of which the young boy had not been informed and he put his head out of the opening to see what stopped it, when it suddenly started again and he received injuries for which he sued. In their opinion the court said: "It is clear that care was not exercised (by the proprietors) and when the machine stopped in its ascent, the child was taken by surprise; he did what most likely an older person on the spur of the moment would have done; and even had he been told in a casual way not on any occasion to put his head out of that opening, I doubt whether he would have been guilty of contributory negligence. There was nothing more natural than for him to look to

see, if he could, what was the cause of what was to him an extraordinary event in the passage of the elevator."

The fact that in filling an ice house, cakes of ice occasionally fell off the runway or elevator, ascending from the edge of the water up to the ice house, is notice to the proprietor of the dangers of the location and they are liable to an employee injured by the falling of a piece of ice. (*Knickerbocker Ice Co. v. Bernhardt*, 95 Ill. App. 23.)

Where the wheel operating a hoist revolved in a jarring manner causing excessive strain, this condition was notice to an employee, who had worked in the same business five years, that the wheel was out of order. (*Pantz v. Plankington Packing Co.*, 118 Wis. 47; 94 N. W. Rep. 654.)

The "danger notice" placed on an elevator has no application to one who runs the elevator and who has a right to be upon it. (*Boess v. Clausen & Price Brewing Co.*, 12 Hun, 370).

*Myers v. Falk* (99 Va. 385; 3 Va. Sup. Ct. Rep. 273; 38 S. E. Rep. 178) was an action brought to recover damages for an injury received by the plaintiff below when stepping out of an elevator in the store of the defendants (the appellants), where she was employed as a saleswoman. It appears that the plaintiff had been in one of the upper stories of the establish-

ment, and, after making a sale, was returning with the customer, on the elevator, to the lower floor; that when she attempted to leave the elevator she made a false step, in consequence of the elevator being six or eight inches above the level of the floor, and injured her knee, resulting in the loss of her leg, which had to be amputated. Two grounds of liability are charged: First, that the defendants negligently failed to exercise reasonable care in the selection of a competent person to run the elevator. Second, that the defendants negligently allowed the elevator to become unsafe and out of repair.

The court said: "Knowledge of the incompetency of the elevator boy could have been brought home to the defendants by showing either that they saw his acts of negligence, or that such acts of negligence occurred so frequently that the law would presume knowledge thereof. So, knowledge of the defective condition of the elevator could be shown by proving actual knowledge on the part of the defendants, or by showing that it had been out of condition for such length of time that the law would presume knowledge on their part."

**§ 121. Employee does not assume risk of latent defects.** — From the case last referred to it appears that the risk of defects in elevators to which

the attention of employees had not been directed and the existence of which could not have been discovered by them by the exercise of reasonable diligence are not assumed by such employees as incident to their employment. (See *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93; 64 N. E. Rep. 726; *Vendler v. People's House Furnishing Co.*, 165 Mo. 527; 65 S. W. Rep. 737; *Leonard v. Kinnare*, 174 Ill. 532; 51 N. E. Rep. 688; *Bradbury v. Kingston Coal Co.*, 157 Pa. St. 231; 27 At. Rep. 400; 33 Wkly. N. C. 94.)

In the case of *Fairbank Canning Co. v. Innes* (24 Ill. App. 35), the material facts were succinctly stated in a part of the opinion of the court as follows: "It further appears that a steam-brake, which was on the elevator, was removed, and it does not appear that the attention of Innes (the motorman), was called to the fact that there was no air or steam-brake upon it when he was placed in charge of it. So far as external appearances went, the elevator appeared to be in good condition. The superintendent told Innes when he went upon the elevator that he must look out and run at his own risk, and Innes told him not to be afraid, that he had run an elevator for twenty years. \* \* \* We think that the conversation had reference to his care and his competency, and that it cannot be understood as an agreement on his part



that he took the risk of defects in the construction or machinery of the elevator which were unknown to him, or that it can be construed to relieve the appellee from the duty of using reasonable care to provide upon the elevator such appliances for safety as were known and in general use."

In *Shattuck v. Rand* (142 Mass. 83; 7 N. E. Rep. 43), it was held that in an action for personal injuries caused by the falling of the defendant's hydraulic elevator while the plaintiff was riding therein, the defendant was entitled to the more specific instructions to the jury (which were refused) as follows: "If the elevator had all known safety appliances, and the defendant had no knowledge or reasonable cause to believe that there was any danger from air coming from the street pipe, and an accident happened therefrom, he would not be liable, even if he had knowledge that the water was being shut off."

**§ 122. Employee does not assume risk of latent defects — *Leland v. Hearn*.**— In the case of *Leland v. Hearn* (63 N. Y. Sup. 204; 49 App. Div. 111), the facts were that an elevator boy, nineteen years of age, was cleaning out the shaft of the elevator, in accordance with his line of duty, when the elevator suddenly descended from the sixth floor and so crushed

him that he died. He knew that the elevator was in the habit of sagging slightly and that it had actually fallen on a previous occasion; but had good reason to believe that it had been repaired. The court, in reversing a judgment nonsuiting the administratrix of the elevator boy in a suit to recover damages for his death, said: "It is well settled that dangers which can be mitigated or avoided by reasonable care on the part of the master are not incident to the business. Leland assumed no other risk save that ordinarily incident to operating such an elevator. He did not assume the risk of its getting and remaining out of repair, where the defects were known to his employers, and the latter failed to remedy them. *Meehan v. Judson*, 43 App. Div. 46; 59 N. Y. Sup. 578. The risk here was not obvious. In fact, there was little or no risk, while the elevator was in proper condition, in the performance of the particular duty. The risk was caused solely by the master's negligence in permitting it to become dangerous. The rule, under the circumstances here disclosed, limits the employee's contributory negligence to acts which are inevitably or imminently dangerous. *Hawley v. Railway Co.*, 82 N. Y. 372; *Patterson v. Railroad Co.*, 76 Pa. 389." (See *Kirk v. Senig*, 79 Ill. App. 251.)

§ 123. **Employee's contributory negligence.**—Negligence is rarely a question of law (*Tvedt v. Wheeler*, 70 Minn. 161; 22 N. W. Rep. 1062; *The H. C. Co. v. Hahn*, 189 Ill. 28), but should be usually submitted to the jury under proper instructions. (*Steinke v. Diamond Match Co.*, 87 Wis. 477; 58 N. W. Rep. 842; *Simpson v. Gerken*, 45 N. Y. Sup. 1100; 19 App. Div. 68; *Stackpole v. Wray*, 77 N. Y. Sup. 633; 74 App. Div. 310; *Perras v. Booth*, 82 Minn. 192; 84 N. W. Rep. 739; 85 N. W. Rep. 179; *Olson v. Hanford Produce Co.*, 111 Iowa, 348; 82 N. W. Rep. 903; *Rhodus v. Johnson*, 24 Ind. App. 402; 56 N. E. Rep. 942; *Rudolph v. Montart*, 56 N. Y. Sup. 28; 37 App. Div. 396; *Cleary v. Dakota Packing Co.*, 71 Minn. 150; 73 N. W. Rep. 717, 1099; 76 Minn. 495; 79 N. W. Rep. 531; *Illinois Fuel Co. v. Parsons*, 38 Ill. App. 182; *Hughes v. Fagin*, 46 Mo. App. 37; *Riland v. Hirshler*, 7 Pa. Super. Ct. 384; *Karch v. Kipp*, 90 N. Y. Sup. 404; *Gribben v. Yellow Aster, etc., Co.*, 142 Cal. 248; 75 Pac. Rep. 839; *Lodi v. Maloney*, 184 Mass. 240; 68 N. E. Rep. 229; *Humphreys v. Portsmouth Trust, etc., Co.*, 184 Mass. 422; 68 N. E. Rep. 836; *Beidler v. Braunshaw*, 200 Ill. 425; 65 N. E. Rep. 1086; *Poindexter v. Paper Co.*, 84 Mo. App. 352; *Stomne v. Hanford Produce Co.*, 108 Iowa, 137; 78 N. W. Rep. 481; *Schmidt v. Metropolitan Life Insur-*

ance Co., 43 N. Y. Sup. 318; 13 App. Div. 120; *Watson v. Duncan*, 61 N. Y. Sup. 667; 46 App. Div. 298; *McCarty v. Rood Hotel Co.*, 144 Mo. 397; 46 S. W. Rep. 172; *Mulvey v. R. I. Locomotive Works*, 14 R. I. 204; *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233; 73 Pac. Rep. 163; *Kann v. Meyer*, 88 Md. 547; 5 Am. Neg. Rep. 152; 41 At. Rep. 1065; *Peoples' Bank v. Morgolofski*, 75 Md. 432; 32 Am. Rep. 262; *Greenwell v. Market Co.*, 21 Dist. of Col. 305; *Bourbannais v. West Boylston Manufacturing Co.*, 184 Mass. 250; 68 N. E. Rep. 232; *Alaska United Gold Min. Co. v. Muset*, 114 Fed. Rep. 66; 52 C. C. A. 14; *Swanson v. Boutel* (Minn.), 103 N. W. Rep. 886). And see *Thompson on Neg.*, §§ 1086 *et seq.* See, also, *ante*, §§ 104, 105.)

Brisco, J., in delivering the opinion of the court in *Meister v. Alber* (85 Md. 72; 36 At. Rep. 360), said: "The principal of law governing the cases is thus stated by this court in *Lewis v. B. & O. R. R. Co.*, 38 Md. 599: 'Without reviewing the many cases in which the subject of negligence has been considered, the question in this and in all cases of like kind is whether the injury complained of was caused *entirely* by the *negligence* or *improper conduct of the defendant* or whether the plaintiff so far contributed to the same by *his own negligence* or *want of ordinary care and prudence*, that

but for such negligence or want of care and prudence the injury would not have happened. In the first case the plaintiff would be entitled to recover, in the latter he would not, unless the defendant by the exercise of care and prudence might have avoided the consequences of the plaintiff's negligence.' "

A plea of contributory negligence is not available where the defendant was willfully negligent. (Union Warehouse Co. v. Prewitt, 21 Ky. Law Rep. 67; 50 S. W. Rep. 964.)

Usually the burden of proving contributory negligence rests upon the defendant (Boyd v. Blumenthal, 3 Pennewill, Del. Rep. 567; 52 At. Rep. 330), but there are many authorities which support the rule that the plaintiff must make out a *prima facie* case of freedom from negligence on his own part. (See Rudolph v. Montant, 56 N. Y. Sup. 28; 37 App. Div. 396, and many of the above cited cases, and the text-books on negligence, etc.)

**§ 124. Employee's contributory negligence — Continued.**— A workman is guilty of contributory negligence where he backs into an elevator shaft when he knows that other parties sometimes use the elevator and that it is liable to be moved by them from the position in which he last left it. (Smith v. Van Sciver, 58 N. J. L. 190; 33 At. Rep. 390.)

An operator who knew better but who tried to operate an elevator while the rope was slack and was injured is guilty of contributory negligence. (*Hammergren v. Schurmeier*, 7 Fed. Rep. 766; 2 McCrary, 520. See *Consolidated Stove Co. v. Staggs* (Ind. App.), 71 N. E. Rep. 161; *Carter v. Piano Co.* (Mass.), 58 N. E. Rep. 476; *Dashiel v. Washington Market Co.*, 25 Wash. L. Rep. 123; 10 App. D. C. 81.)

So, where the operator shoved the shipper rod three times, the first two times without causing any movement of the elevator. (*Murphy v. Webster*, 156 Mass. 48; 30 N. E. Rep. 88; affirming *s. c.* 151 Mass. 121; 23 N. E. Rep. 842.)

So, where one operating a crane fails to properly anchor it. (*Wagner v. New York, C. & St. L. R. Co.*, 86 N. Y. Sup. 921; 93 App. Div. 14.)

So, where an employee leans against an ordinarily sufficient guard rail, which gave way precipitating him into the elevator shaft below. (*Weiss v. Jenkins*, 57 N. Y. Sup. 707; 39 App. Div. 567. See *Tisch v. Hirsch*, 53 N. Y. Sup. 926; 34 App. Div. 623.) So, where an employee for his own convenience chooses a dangerous passageway under an elevator instead of going around, he cannot recover for the injury following. (*Burk v. Edison General*

Electric Co., 89 Hun, 498; 69 N. Y. St. Rep. 757; 39 N. Y. Sup. 313.)

Where a freight elevator steps without apparent cause the operator is not negligent in remaining upon it instead of climbing out. (Kleibaz v. Middleton Paper Co., 180 Mass. 363; 62 N. W. Rep. 371.)

It is not negligence as a matter of law for a workman employed in a basement to look up an elevator shaft to see that the elevator is stationary, but who is struck by another falling object. (Hoes v. Edison General Electric Co., 161 N. Y. 35; 55 N. E. Rep. 285. See Conner v. Koch, 71 N. Y. Sup. 836; 63 App. Div. 257; McGuigan v. Beatty, 186 Pa. St. 329; 42 W. N. C. 277; 40 At. Rep. 490; Ransdell v. Jordan, 168 Mass. 505.)

And it is held that putting one's head into the shaft of a dumb-waiter not in motion is not negligence *per se*. (Winkelman v. Colladay, 88 Md. 78; 4 Am. Neg. Rep. 645. See Krey v. Schlussner, 42 N. Y. St. Rep. 917; 16 N. Y. Sup. 695.)

But one who steps into an elevator shaft to pick up a piece of rope which he desires to use is negligent. (O'Donnell v. International Navigation Co., 53 N. Y. Sup. 290; 49 App. Div. 408. See Kossman v. Stutz, 5 N. Y. Sup. 764.)

In Hackett v. Middlesex (101 Mass. 101),

an employee in a factory in the performance of his line of duties signaled for the freight elevator and while looking down the shaft to see if freight below was ready to be brought up, was struck by the platform of the elevator, which fell by reason of the breaking of a chain. The evidence tended to show that originally the chain was made of nine-sixteenths iron but that it was now at the place of breaking to three-sixteenths of an inch. It was *held* that the question of negligence on the part of the defendant and contributory negligence on the part of the plaintiff were for the jury.

§ 125. **Employee's contributory negligence — Continued.** — In *Degnan v. Jordan* (164 Mass. 84) the plaintiff was, at the time of the accident, an elevator tender, forty-three years of age, who had been running the elevator for defendants for about a fortnight and understood his business fairly well. Finding the elevator below the first floor he went down to the basement as he had been told by the engineer to do in such a case, meeting there a man who told him he could not move the elevator. Thereupon, without reporting to the superintendent of the elevators or to the engineer, plaintiff stooped into the elevator well under the elevator for the purpose of reaching the elevator rope which was in one corner, and as he pulled the rope the



elevator came down on him, causing the injuries complained of. The court said: " We think that, in view of the notice he had from the situation of the elevator that something about it was probably out of order, his conduct in exposing himself to injury from this sudden descent was wanting in due care."

In the case of *Daley v. American Printing Company* (150 Mass. 77; 22 N. E. Rep. 439): " There was evidence tending to show that the plaintiff was employed on work which required him to use the elevator; that the elevator was operated by a belt which passed over a pulley situated about twelve feet from the elevator; that the belt was off from the pulley; and that the plaintiff's injury occurred while he was putting it on, in order to enable him to use the elevator in doing his work." It appearing that on the trial it was a question whether it was necessary for the plaintiff himself to attend to putting on the belt, it was held that evidence offered upon this point should have been admitted. (See *Hill v. Iver Johnson Sporting Goods Co.* (Mass.), 74 N. E. Rep. 303.) Where a plaintiff's duty was to trim lamps in high towers and in a certain instance the foreman ordered him to ascend a tower for that purpose or to see if the lamp had been trimmed, it was his duty to do so, whether the lamp had been actually trimmed or not, and there

was no contributory negligence on the part of the plaintiff who was injured by the breaking of the cable. (*Weiden v. Electric Light Co.*, 73 Mich. 268.) Whether a carpenter who leaned a part of his body inside the shaft of an elevator which he was engaged in repairing was guilty of contributory negligence was for the jury. (*Hughes v. Fagin*, 46 Mo. App. 37.)

Where an employee in a warehouse containing merchandise was fatally injured by falling into an open elevator shaft, the merchandise was piled in many places to the ceiling, narrow spaces being left for walks in various directions, one of which led past the elevator. The deceased was sent from the second floor to the third floor to bring down a dozen wire potato maskers. He ascended by means of the stairway but on his return he fell into the elevator shaft and was when found below unconscious with the goods still in his hands. There was evidence which tended to show that the elevator gate had been left open by one of the defendants, and that goods had been piled unusually near the gate. Near the elevator was an unlighted gas jet but employees were not to light it unless needed, and not to use the elevator except for heavy freight. The deceased knew these facts and there was no affirmative proof that he was free from contributory negligence. It was held that the jury should determine

whether the deceased was free from contributory negligence, and that in determining this they may consider the natural instinct to avoid danger. (*Hopkinson v. Knapp*, 92 Iowa, 328. See *Kennedy v. Frederick*, 168 N. Y. 379; 61 N. E. Rep. 642.)

**§ 126. Employee's contributory negligence. — Minors.** — “When an infant who has not reached the age of discretion is charged with concurrent negligence, it becomes important to inquire if he had sufficient understanding to comprehend and guard against the peril he was in, and this matter is ordinarily to be considered by the jury, in connection with other circumstances of the case and under proper instructions from the court.” *Strawbridge v. Bradford*, 128 Pa. St. 200; 24 W. N. C. 536; 20 Pitts. L. J. S. 143; 47 Phila. Leg. Int. 203; 18 At. Rep. 346.)

In *Stone v. Boscawen Mills* (71 N. H. 288; 52 At. Rep. 119), the plaintiff was employed as a bobbin boy in the defendants' yarn mills where a small elevator was used in transporting the bobbins from floor to floor. The elevator was usually operated by the boys, and the plaintiff was familiar with the general operation of the elevator. “On the day of the accident the plaintiff loaded the elevator at the first floor, set it in motion, and started to walk up the stairs. At the second floor he stopped to see if there

would be a load for him to take on his return, and then looked out of the window at a wedding procession. When he returned to his duties he found that the elevator had gone to the attic, and in some way learned that it was stuck there. He then went up and found that it was held fast by the shoe, upon the bottom of the box of bobbins, being caught between the floor of the elevator and the back of the well. He looked at the rope, which appeared to be pulling up on the elevator. Thinking that if the box were released the elevator would ascend, he stooped over the guard rail or board which was across the front of the well, and pulled the box. The elevator fell, the cross bar at the top striking the plaintiff on the back of the head and precipitating him with the elevator substantially to the bottom of the well.

“The rope had theretofore become uncoiled upon the attic floor, out of sight of the plaintiff and in a separate room, which he supposed was then locked, according to the general custom.

\* \* \*

“At the close of the plaintiff's evidence the defendants moved for a nonsuit, and at the close of all the evidence that a verdict be directed in their favor. The motions were denied, and the defendants excepted.” The exceptions were overruled.

§ 127. **Employee's contributory negligence — Minors — Continued.** — A child of an employee in a salesroom was injured while protruding its head into the open elevator shaft to see where the father had gone with the elevator and it was held that the proprietor was not responsible for the injury. (*Jansen v. Siddall*, 41 Ill. App. 279; reversed on another point in 143 Ill. 537; 30 N. C. Rep. 357. See *Ramsdell v. Jordan*, 168 Mass. 505; *Guichard v. New*, 41 N. Y. Sup. 456; 9 App. Div. 485.)

A boy of eighteen years of age employed to run an elevator having regular attendants is negligent in undertaking to run another elevator which has no attendant. (*Hansen v. State Banking Building Co.*, 100 Iowa, 672; 69 N. W. Rep. 1020.)

In *Rood v. Lawrence Mfg. Co.* (155 Mass. 591), the facts briefly were that a nineteen-year-old boy was set to running a freight elevator, the car of which was formed of crossed iron rods joining the platform with parallel cross-beams at the top; and which was set in motion and stopped by means of a shipper-rod outside. Another boy directed by his employer to teach him how to run the elevator, showed him how to pull down or turn the shipper-rod to stop the elevator in its descent, but he had no further instructions. Subsequently while descending from an upper floor and before passing it, he

put his hand out above the crossed rods and below the cross-beam, and grasped the shipper-rod so as to stop at the floor below. He held to the shipper-rod until his hand was caught between the cross beam and the edge of the opening in the upper floor, and was injured. It was held that he could not maintain an action for his injuries.

Where a boy employed in a business house drags a thirty pound "sausage casing" to the elevator shaft, opened the door, although the elevator was not there, fell down the shaft and was killed, the proprietor is not liable. (*Roberts v. Hopper*, 55 Neb. 598; 75 N. W. Rep. 1107.)

Nor is he where a boy under twelve years of age, who was employed to carry waste material down an elevator, was injured by standing on the automatic doors closing the elevator shaft, while the elevator was ascending from below him. (*Kaufhold v. Arnold*, 163 Pa. St. 269.)

A child who goes upon premises in search of employment and who remains and amuses himself running an elevator until injured cannot hold the owner responsible. (*Hinds v. Breckenridge Co.*, 16 Ohio Cir. Ct. Rep. 12; 8 Ohio Cir. Ct. Dec. 231.)

An elevator might be perfectly safe for a man of judgment and experience and yet unsafe for the use of a boy of a certain age and degree of

inexperience. However, the danger which would result from allowing one of his feet to project beyond the platform of an elevator should be apparent to a youth fourteen years of age and of ordinary capacity. (*Costello v. Judson*, 21 Hun, 396.)

**§ 128. Employee's contributory negligence — Omission of statutory duty.** — In an action founded on the omission of a statutory duty, contributory negligence cannot be charged, as failure to sufficiently light the top of a shaft, as required by law, resulting in the death of a miner. (*Odin Coal Co. v. Denman*, 185 Ill. 413; 87 N. E. Rep. 192. See, *ante*, §§ 43, 46, 79.)

**§ 129. Failure to file employment certificate.** — A minor's failure to file with the establishment where he is employed the statutory certificate to be issued by the board of health in such cases does not affect the liability of his employer for injuries resulting in his death. (*Lowry v. Anderson*, 89 N. Y. Sup. 107; 98 N. W. Rep. 945).

**§ 130. Master liable where in special control.** — As heretofore seen (*ante*, §§ 29, 106) control usually carries with it corresponding liability for negligence in operation. (See *Ferris v.*

Aldrich, 19 N. Y. Sup. 353; 47 N. Y. St. R. 40; Wolf v. Devitt, 82 N. Y. Sup. 189; 83 App. Div. 42; Appel v. Eaton & Prince Co., 97 Mo. App. 428; 71 S. W. Rep. 741; Sullivan v. Thorndike Co., 175 Mass. 41; 56 N. E. Rep. 600; Dervin v. Herman, 55 N. Y. Sup. Ct. 275; Benzing v. Steinway, 101 N. Y. 552; Wells v. Bourdages, 88 Ill. App. 473; Sievers v. The Peters Box & Lumber Co., 151 Ind. 642; 50 N. E. Rep. 877.)

In *Lorentz v. Robinson* (61 Md. 64), the principal facts were that the defendants Lorentz and others were copartners, and owned a large building in which they manufactured fertilizers. In this building was a steam elevator running from the first to the third floor, by which materials used in the business were hoisted or lowered. The elevator had an automatic arrangement so adjusted that with a ton weight on the platform it would stop at the third floor. It could be also stopped in the usual way by pulling the check chain or rope. The plaintiff had been in the employ of the defendants about a year, and had at one time worked on the elevator; but at the time of the accident he was working in the manufacturing-room on the third floor of the building. While one of the defendants was upon the elevator for the purpose of ascending to the third floor, he endeavored to stop or control it but could not, when he called



to the plaintiff and ordered him to stop the elevator. The said defendant stepped off as the plaintiff, without knowing that the elevator was out of order, stepped on, and was carried rapidly upward by the elevator which struck the machinery and structure above with such force that they gave way, and it was instantly precipitated to the ground below, injuring the plaintiff.

In affirming the judgment of the court below in favor of the plaintiff, Miller, J., said: "If injury results to the servant from the direct act or negligence of the master, as where he is personally present superintending the work and giving orders, he is answerable for the damages to the same extent as if the relation of master and servant did not exist. This doctrine is illustrated by cases where the master, without warning him of the danger, orders his servant into a situation which the master knows, and the servant does not know, to be dangerous, and the latter obeys and is thereby injured." Citing 2 *Thomp. on Neg.* 974, 975; *Wharton on Neg.*, Sec. 210; *Wood on Master and Serv.*, Sec. 414; *Baxter v. Roberts*, 44 *Calif.* 187; *Strahlendorf v. Rosenthal*, 30 *Wis.* 674; *Dawes v. England*, 10 *Jurist (N. S.)* 1235. Where repairs have been begun but not finished and an employee is injured while using the elevator under the insistence of the employer the latter is liable

for an injury occurring to the former. (Dervin v. Herrman, 58 N. Y. Super. Ct. (26 Jones & S.) 193; 9 N. Y. Sup. 722.)

So, where a coal company violates one of its rules regulating the sounding of signals, and an employee is injured, the company is liable. (Silver Cord Combination Mining Co. v. McDonald, 14 Colo. 191; 23 Pac. Rep. 346.)

But the master is not liable for an injury to a servant's hand received while carelessly slacking an elevator rope under his directions. (Lodi v. Maloney, 184 Mass. 240; 68 N. E. Rep. 229.)

**§ 131. Parties in pari delictu.**—Where the parties are equally at fault there can be no recovery of damages. Thus where the superintendent of a coal mine failed to put catches on the brakes, as the law required of the owner, and as a consequence of such failure is injured, he cannot maintain a suit for damages against the owner. (Beaucoup Coal Co. v. Cooper, 12 Ill. App. 373.)

**§ 132. Proof of similar injury.**—Proof of a similar injury to another person, received under different circumstances, in another elevator of the defendant of like construction, of which injury the defendant had notice, is inadmissible evidence, being collateral to the issue. (Wise v. Ackerman, 76 Md. 375; 25 At. Rep. 424. See

Auld v. Manhattan Life Insurance Co., 34 App. Div. 491, affirmed in 165 N. Y. 610.)

§ 133. **Employment of minors.** — Operators of elevators who employ minors must use care for their safety which is commensurate with their age, experience and opportunities for observation. Thus, it is for the jury to determine whether a boy of fourteen years of age knew the danger of a machine which he undertook to oil. (B. F. Avery & Son v. Meek (Ky.), 45 S. W. Rep. 355.) Where the employment of minors under a certain age is prohibited by statute, more than ordinary precautions for their well-being and safe-guarding must be exercised by their employers. (O'Brien v. Sanford, 22 Ontario Rep. 136. See Lowry v. Anderson, 89 N. Y. Sup. 107; 98 N. W. Rep. 945; Hendrix v. Cooleemee Cotton Mills (N. C.), 50 S. E. Rep. 561; Moylon v. D. S. McDonald Co., (Mass.), 74 N. E. Rep. 829). The rule of law should be in harmony with the well-established principle that the intentional violation of a statute is negligence *per se* (see *ante*, § 43).

§ 134. **Judicial notice of incapacity of children to run elevators.** — In the case of Smillie v. St. Bernard Dollar Store (47 Mo. App. 407), where a twelve-year-old boy was employed in a retail store to operate the elevator

on which the other employees including many minors were accustomed to travel in the course of business, it was insisted by counsel for the plaintiff that the employment of the boy operator under the circumstances was in itself negligence and that of this the court should take judicial notice. The majority of the court rejected this proposition, delivering an opinion to which Judge Thompson very properly excepted and delivered a dissenting opinion which states the law as it should be, as follows: "Elevators in large buildings, operated either by steam or by hydraulic power, designed to carry persons or freight between the lower and higher floors, have come into such common use that the courts may well take judicial notice of their physical characteristics. So many accidents have been caused to persons on these machines, either owing to their defective construction, their non-repair or their defective operation, that those who are appointed to administer justice cannot refrain from taking notice of their dangerous character. \* \* \* We must also take judicial notice of the fact, that young boys act inconsiderately and from impulse, and that they are apt to get careless. Such being the dangerous character of these machines, and such being the well-known tendencies of young boys, I am prepared to say that to put a boy of twelve years old in charge of such a machine in a retail

store, where other young boys are employed whose duty required them to go up and down on the machine, is evidence of negligence to go to a jury, as a mere conclusion of law."

§ 135. **Fellow-servants.**—Employees in the same general line of employment are regarded as fellow-servants, and for their injuries to each other they are responsible, but their employer is not. The only difficulty in determining questions of this sort is in deciding who are fellow-servants and who are not. (See *Steinke v. Diamond Match Co.*, 87 Wis. 477; 58 N. W. Rep. 842; *Grams v. C. Reiss Coal Co.* (Wis.), 102 N. W. Rep. 586; *Nutzmann v. Germania Life Insurance Co.*, 82 Minn. 116; 84 N. W. Rep. 730; *Spees v. Boggs*, 198 Pa. St. 112; 47 At. Rep. 875; *Slack v. Harris*, 200 Ill. 96; 65 N. E. Rep. 666, affirming 101 Ill. App. 527; *Adams v. Snow*, 106 Wis. 152; 81 N. W. Rep. 983; *Beyer v. Victor*, 2 Misc. Rep. (Super. N. Y.) 496; 22 N. Y. Sup. 392; *Sell v. Lumber Co.*, 70 Mich. 479; 38 N. W. Rep. 451; *McAndrews v. Burns*, 39 N. J. L. 118. And see *Thompson on Neg.*, § 1092.)

Thus, there is authority to the effect that the master is not responsible for an accident to a servant resulting from the negligence of a fellow-servant engaged in rigging a derrick or

similar appliance, when such work is a part of the common employment. (*Maxfield v. Graveson*, 131 Fed. Rep. 843, citing *Peschel v. Chicago, Milwaukee & St. Paul Railway*, 62 Wis. 338; 21 N. W. Rep. 269; *Beesley v. Wheeler & Co.*, 103 Mich. 196; 61 N. W. Rep. 658; 27 L. R. A. 266; *Kalleck v. Deering*, 161 Mass. 469; 37 N. E. Rep. 450; 42 Am. St. Rep. 421; *McGinty v. Athol Reservoir*, 155 Mass. 183; 29 N. E. Rep. 510; *Marsh v. Herman*, 47 Minn. 537; 50 N. W. Rep. 611; *Karch v. Kipp*, 90 N. Y. Sup. 404; *Bauer v. American Car & Foundry Co.*, 132 Mich. 537; 94 N. W. Rep. 9; 10 Det. Leg. N. 17.)

§ 136. **Fellow-servants — Continued.** — Where an elevator worked by an engine and used to raise grain into a barn fell through the negligence of the engineer and injured the plaintiff who was a servant on the defendant's farm, it was held that he was a fellow-servant of the engineer and not entitled to recover. (*Stringham v. Stewart*, 27 Hun, 562; 64 How. Pr. 5; see *Kelly v. Boston Lead Co.*, 128 Mass. 456.)

So persons engaged in removing goods from a store, one at the elevator and others at the trucks, are fellow-servants. (*Alford v. Metcalf*, 74 Mich. 369; 42 N. W. Rep. 52. See *Perras*

v. Booth, 82 Minn. 192; 84 N. W. Rep. 739; 85 N. W. Rep. 179.)

And a laborer employed in building a bridge and the engineer operating the hoisting machinery are fellow-servants. (Ryan v. McCully, 123 Mo. 636.)

Where the plaintiff, a mason employed with other masons, section men and carpenters, in the erection of a wind-mill and water tank for the defendant railroad company, was injured by the falling upon him of a portion of the framework of the windmill which he was helping to raise, the apparatus for raising such framework, consisting of a windlass, ropes, tackle blocks; the water tank itself and an anchor post set in the ground about sixty feet away, all set in position under the direction of the foreman, and the fall of the framework being caused by the giving way of the anchor post, it was held that the whole apparatus for hoisting consisted of only one machine. The court said: "But it is claimed that, as the plaintiff, Brooks, was a superior servant, or so represented the company in doing the work as to make it liable for his negligent acts. There are surely cases which hold that a servant may recover in any action against the master for an injury occasioned by the negligence of another servant when the latter is engaged in a different or distinct branch or department of service. But it seems to us

that Brooks and the men under him must be regarded as fellow-servants engaged in the same common work or employment. \* \* \* It is true, Brooks had charge of this work of erecting the tank and windmill. In certain cases it appears he was authorized to discharge a man under him who did not work to suit him and hire another in his place. But he had no general authority to hire and discharge the men under him. \* \* \* They were certainly all subject to the control and direction of the same master, and were engaged to do the same work." (*Peschel v. Chicago, etc., Ry. Co.*, 62 Wis. 338. See *Ingram v. Fosburg*, 76 N. Y. Sup. 344; 73 App. Div. 129; *Andre v. Winslow Bros. Elevator Co.*, 117 Mich. 560; 76 N. W. Rep. 86; 5 Am. Neg. Rep. 53, note.)

A bell boy and an elevator boy in a hotel are fellow-servants. (*Kitchen Bros. Hotel Co. v. Dixon* (Neb.), 98 N. W. Rep. 816.)

A chambermaid in a hotel is a fellow-servant of the operator of an elevator therein. (*Oriental Inv. Co. v. Sline*, 17 Tex. Civ. App. 692; 41 S. W. Rep. 130. See *McCarty v. Rood Hotel Co.*, 144 Mo. 397; 46 S. W. Rep. 172.)

The operator of an elevator and carpenters engaged in its construction (*Gittens v. William Porter Co.*, 90 Minn. 512; 97 Mo. 378) or in repairing it, are fellow-servants. (*Mann v.*



O'Sullivan, 126 Cal. 61; 6 Am. Neg. Rep. 417.)

In showing the incompetency of a fellow-servant it is not enough to prove his general reputation but specific acts of incompetency must be shown. (Lambrecht v. Pfizer, 63 N. Y. Sup. 591; 49 App. Div. 82; 7 Am. Neg. Rep. 506, note.)

An employee cannot recover for an injury received while removing *debris* from a chute placed there by a fellow-servant. (Healy v. Smith, 17 N. Y. Sup. Rep. 851; affirmed, 63 Hun, 631.)

§ 137. **Fellow-servants—Continued.**—“It has also been adjudged that a laborer and a foreman using a derrick are fellow-servants (citing Duffy v. Upton, 113 Mass. 544), and that a foreman in charge of a derrick is a fellow-servant of a laborer engaged in moving a stone on a truck, both being in the employ of the same master (Scott v. Sweeney, 34 Hun, 292).” McKinney on Fellow-Servants, pp. 328, 329. See Wood's Law of Master and Servant, pages 865 *et seq.* *Contra*, Canning v. McMillan, 55 Ill. App. 232; Leiter v. Kinnare, 68 Ill. App. 558.)

But an overseer is not a fellow-servant of a laborer. (Kirk v. Senig, 79 Ill. App. 251;

**McCauley v. Norcross**, 155 Mass. 585; 30 N. E. Rep. 464.)

One engaged in receiving timbers raised by a derrick is a fellow-servant of another employee who stands on the ground and operates the machinery, where both receive orders from the same superintendent. (*Gunn v. Willingham*, 111 Ga. 427; 36 S. E. Rep. 804; *Sheehan v. Prosser*, 55 Mo. App. 569. See *Wagner v. New York, C. & St. L. R. Co.*, 78 N. Y. Sup. Rep. 696; 76 App. Div. 552.)

A laborer removing grain from the platform of an elevator is the fellow-servant of the engineer of the engine operating it. (*Stringham v. Hilton*, 111 N. Y. 188; 18 N. E. Rep. 870; 1 L. R. A. 483. See *Wolcott v. Studebaker*, 34 Fed. Rep. 8; *Moran v. Carlson*, 88 N. Y. Sup. 520; 95 App. Div. 116.)

So the runner of a steam engine used in operating the hoist of a mine is a fellow-servant of the men employed therein. (*Buckley v. Gould & Curry Silver Mining Co.*, 14 Fed. Rep. 833; 8 Sawy. 394. See *Niantic Coal & Mining Co. v. Leonard*, 25 Ill. App. 95; *Bradbury v. Kingston Coal Co.*, 157 Pa. St. 231; 27 At. Rep. 400; 33 Wkly. N. C. 94; *Trewatha v. Buchanan Gold Mining and Milling Co.*, 96 Calif. 494; 38 Pac. Rep. 571; 31 Pac. Rep. 561; *Starne v. Schlothane*, 21 Ill.

App. 97; Spring Valley Coal Co. v. Patting, 86 Fed. Rep. 433.)

But not where the miners have nothing to do with the operation of the elevator cage. (Illinois Third Vein Coal Co. v. Cioni (Ill.), 74 N. E. Rep. 751.)

§ 138. **Fellow-servants — Vice-principal.** — If a foreman or contractor has absolute control of the work with power to direct the methods of conducting it and employ and discharge workmen at his option the owner of the work may be responsible to workmen for injuries inflicted by the negligence of the contractor or foreman, since he is not a fellow-servant but is in a relation which in America is called that of "vice-principal." (See *ante*, §§ 23-29. And see Sievers v. The Peters Box and Lumber Co., 151 Ind. 642; 50 N. E. Rep. 877.)

Thus, in a suit by A., a servant, against N., his master, for injuries caused by the fall of an elevator used in N.'s business for raising goods and upon which A. was ascending when injured, evidence was introduced that N. had instructed his foreman to warn the men of a rule of the house prohibiting their going on the elevator. It was held, that an instruction by the *nisi prius* judge that if there was such a rule, and the foreman neglected to give notice of it to the men, it was a fault of a fellow-servant and that

A. could not recover, was erroneous (*Avilla v. Nash*, 117 Mass. 318).

In *Corcoran v. Holbrook* (19 N. Y. 517; 17 Am. Rep. 369), the facts briefly stated were that the owners of a cotton mill gave its management no attention but intrusted it entirely to a general agent, with full power. The employees in the mill used an elevator which became unsafe and out of repair, of which the general agent had notice but neglected to make repairs. An employee, using the elevator in the course of her employment, was injured by its fall. It was *held* that the mill owners were liable for the injury to their employee, that the general agent was not a fellow-servant; and that the rule that where a principal delegates to an agent the performance of duties towards his employees, the principal is liable for the manner in which they are performed, is applicable to individuals as well as to corporations.

Supporting the doctrine that where the employer places any servant under the direction of a colaborer, the latter must be deemed to act for the master. *McKinney on Fellow-servants*, page 107, refers to *Brennan v. Gordon* (13 Daly, 208), as follows: "As where certain storekeepers order the porter in their store to run an elevator, and, as he had never run one before, furnished him an instructor to teach him

how to do so, they are answerable for any injury to him in the use of the elevator arising from the incompetency or negligence of the instructor; for in such a case the instructor does not stand to the injured party in the relation of a co-servant but as a representative of the master." See *Bailey on Master's Liability for Injuries to Servants*, pages 226 *et seq.*; *Wood's Law of Master and Servant*, pages 814 *et seq.* And see *Hughes v. Fagin*, 46 Mo. App. 37.

Where the owner of a building gives an engineer authority to direct the elevator, the engineer is a vice-principal. (*Slack v. Harris*, 200 Ill. 96; 65 N. E. Rep. 669, affirming 101 Ill. App. 669.)

**§ 139. Fellow-servants — Master's co-operation.**— For an injury to a servant caused by the negligence of a fellow-servant co-operating with that of the master, the latter is liable. (*Auld v. Manhattan Life Insurance Co.*, 54 N. Y. Sup. 222; 34 App. Div. 491, affirmed in 165 N. Y. 610; *Benzing v. Steinway*, 101 N. Y. 552; *Dervin v. Herman*, 55 N. Y. Sup. Ct. 275.)

## CHAPTER IV.

### INJURIES TO LICENSEES AND TRESPASSERS.

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- § 160. Improper use of appliances.
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§ 140. **Licensees.** — In accepting the benefits of a license one assumes all the risks of danger incident thereto except those caused by the willful negligence or affirmative acts of the licensor. (See *Reardon v. Thompson*, 149 Mass. 267; 21 N. E. Rep. 369; *Bedell v. Berkeley*, 76 Mich. 435; 43 N. W. Rep. 308; 15 Am. St. Rep. 370; *Stevens v. Nichols*, 155 Mass. 472; 29 N. E. Rep. 1150; 15 L. R. A. 459; *Mandell v. Wheeler*, 59 Ill. App. 459; *South Bend Iron Works v. Larger*, 11 Ind. App. 370; 39 N. E. Rep. 209; *Galveston Oil Co. v. Morton*, 70 Tex. 400; 7 S. W. Rep. 756; 8 Am. St. Rep. 611; *Faris v. Hoburg*, 134 Ind. 269; 33 N. E. Rep. 1028; 21 Wash. L. Rep. 474; 37 Cent. L. J. 48; *Springer v. Byram*, 137 Ind. 15; *s. c.* 36 N. E. Rep. 361; 23 L. R. A. 244; *Gordon v. Cummings*, 152 Mass. 513; *s. c.* 25 N. E. Rep. 578; 9 L. R. A. 640; *Turner v. Klekr*, 27 Ill. App. 391; *Zoebisih v. Tarbell*, 10 Allen (Mass.) 385; *Grand Tower &c. Co. v. Hawkins*, 72 Ill. 386; *Murray v. McLean*, 57 Ill. 378; *Hinds v. Breckenridge Co.*, 16 Ohio C. C. 12; *s. c.* 8 Ohio C. D. 231; *Burner v. Higman & Skinner Co.* (Iowa), 103 N. W. Rep. 802; *Cusick v. Adams*, 23 N. Y. St. Rep. 548; 21 N. E. Rep. 673. See, *ante*, §§ 17-20.)

Thus, where a fire insurance patrolman in endeavoring to protect goods from fire and water

used an elevator, loaded with merchandise, which was so constructed as to show that it was intended for the carriage of freight, when he might have gone another way, he assumes the risk of the elevator being out of order, since he had no invitation either express or implied to use the elevator. Upon this point the court said: "The fundamental inquiry in this case is whether or not appellee owed a duty to appellant to so construct, keep and maintain the elevator or hoisting apparatus as that it should be a safe means of his transportation from one story of the building to another? Actionable negligence or negligence which constitutes a good cause of action, grows out of a want of ordinary care and skill. The owner of land and of buildings assumes no duty to one who is on his premises by permission only as a licensee, except that he will refrain from willful or affirmative acts which are injurious. As was said in *Sweeny v. Railroad Co.*, 10 Allen, 368: 'A licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils.' " (*Gibson v. Leonard*, 143 Ill. 182; 32 N. E. Rep. 182; 17 L. R. A. 588, affirming *s. c.*



37 Ill. App. 344; 24 Ohio L. J. 441. See *Norris v. Catmur*, 1 C. & E. 576.)

In *Bedell v. Berkey* (76 Mich. 440; 43 N. W. Rep. 308; 15 Am. St. Rep. 370), Campell, J., said: "No one has any right to endanger himself, or to disturb other people's arrangements, by moving around in the dark — if it is dark — in a strange room, into which he has entered of his own accord and without direction. If, instead of hurting himself, he had injured or destroyed some fragile or valuable article left there, he would have found no reasonable excuse for his trespass. He is in no better position because he was seriously hurt than if he had hurt somebody or something else. He is himself responsible for his own misfortune, and made no case for redress."

§ 141. **Licensees — *Parker v. Portland Publishing Co.*** — In *Parker v. Portland Publishing Company*, 69 Me. 173; 31 Am. Rep. 262) the facts in brief were that the defendants had their counting room on the ground floor. The editorial and composing rooms were on the second floor. At the head of the stairs was a hall, on the right hand side was the door leading to the defendants' rooms, and on the left an elevator-way with folding doors. The evidence was that between eleven and twelve o'clock at night the plaintiff was proceeding to

the defendants' rooms on the second floor for the purpose of procuring the insertion of a notice in the newspaper published by them, when, there being no sufficient light in the hall, and the doors to the elevator-way being left open, he fell down the elevator-way and was seriously injured.

In this case the court reached the conclusion that the defendants were not liable for the injury, a conclusion concerning which opinions may well differ, but supported by the following reasoning by the court: "The defendants are only responsible for neglect of duty. They are bound to use ordinary and common care and diligence to keep the premises and the usual passage-way to them safe for the access of all persons coming to them at seasonable hours by their invitation, express or implied, or for any purpose beneficial to them, they exercising ordinary care in so coming. If the premises are in any respect dangerous, they are bound to give such visitors notice, to enable them with ordinary care to avoid the danger. *Knight v. P. & S. & P. Railroad Co.*, 56 Maine, 235; *Campbell v. Portland Sugar Co.*, 62 Maine, 552; *Elliot v. Pray*, 10 Allen, 378; *Sweeny v. Old Colony & Newport Railroad Co.*, 10 Allen, 369; *Chapman v. Rothwell*, 96 E. C. L. 168; *John v. Bacon*, C. P. Law Rep, 437. Such are the general principles of law applicable to the case.

“ The counting room of the defendants was on the ground floor. This was the defendants’ place of business. The editorial and composition rooms were in the second story. If there was an implied invitation or permission merely, as a matter of accommodation, as the defendants’ witnesses testified, the question would arise, if an invitation, whether such invitation could be implied after business hours and through the night, when the inhospitable absence of light would seem to negative such invitation. ”

It was also held that evidence covering a period of about two years tending to show that at different times the hall and entrance way were or were not lighted and that elevator gates were open or not open was not admissible.

§ 142. **Employee may be licensee.**— Where an employee is engaged in making repairs in a building he may lawfully use the elevator if occasion arises as an incident to his employment. (Kentucky Distillers and Warehouse Co. v. Leonard, 25 Ky. Law Rep. 2046; 79 S. W. Rep. 281. See Moran v. Carlson, 88 N. Y. Sup. 520; 95 App. Div. 116; Atchinson v. Wills, 21 App. Cas. D. C. 549; Weiss v. Jenkins, 39 App. Div. 567; Reilly v. Shannon, 180 Pa. St. 53; 2 Am. Neg. Rep. 66. And see *ante*, §§ 112–115). In Ferris v. Aldrich (58 Hun, 610; 12 N. Y. Sup. Rep. 482),

where an employee of a contractor for the construction of a building was injured, without fault of his own, by reason of the unsafe condition of an elevator in the building, which was used by him in his work, it was held, that he was not entitled to maintain an action for his injury. (See *Siegel, Cooper & Co. v. Norton*, 209 Ill. 201; 70 N. E. Rep. 636.)

So in *Toomey v. Sanborn* (146 Mass. 28; 14 N. E. Rep. 921), one who removed a plank from a dimly lighted passage-way was held responsible to an employee who fell into the unguarded hole caused thereby and was injured.

§ 143. **Invitation to premises.** — Where a person invites another upon his premises, he is bound to exercise more than ordinary care towards that other, although not an absolute insurer of his safety. (*Flynn v. Central Railroad Co.*, 142 N. Y. 439; *Bremer v. Pleiss*, 101 Wis. 61; 98 N. W. Rep. 945.) If the person giving the invitation is alone benefited he is responsible for even the slightest negligence. The reason of the rule is that one inviting another to come upon his premises is not expected to be drawing that other into a place of danger but offering at least ordinary safety, so that the person invited is put off his guard and relies upon the implied warranty of safety. (See *Massey v. Seller* ( Oreg. ), 77 Pac. Rep. 397;

Smith v. Parkersburg Co-operative Assoc. (W. Va.), 37 S. E. Rep. 646; McConnell v. Lemley, 48 La. Ann. 1433; 34 L. R. A. 609, *note*; Buckingham v. Fischer, 70 Ill. 122; Rosenbaum v. Shoffner, 98 Tenn. 624; 40 S. W. Rep. 1086; Birnberg v. Schwab, 55 Minn. 495; 56 N. W. Rep. 341; Baker v. Deane, 69 Ill. App. 613; Homer v. Everett, 47 N. Y. Super. Ct. 298, affirmed, 91 N. Y. 641; Wilsey v. Jewett Bros. & Co., 122 Iowa, 315; 98 N. W. Rep. 114.)

Thus, a storekeeper who either expressly or impliedly invites the public to enter his place of business for the purpose of trading must exercise a high degree of care to keep the premises in a safe condition, and where a customer, or any one having any duty there, is injured by accidentally falling into a negligently exposed elevator shaft, the shopkeeper is liable in the absence of negligence on the part of the person injured. (Treadwell v. Whittier, 80 Cal. 574; 22 Pac. Rep. 266; McCrum v. Weil, 125 Mich. 297; 9 Am. Neg. Rep. 59; Freer v. Cameron, 4 Rich. Law. 228; 55 Am. Dec. 663; see Oberfelder v. Doran, 26 Neb. 118; 41 N. W. Rep. 1094; Engel v. Smith, 82 Mich. 1; Burgess v. Stowe, 134 Mich. 204; 96 N. W. Rep. 29; 10 Det. Leg. N. 434, and see Whittaker's Smith on Neg. (2d ed.), p. 280, n.; citing Turner v. Kelekr, 27 Ill. App. 391; Snyder v. Witner,

82 Ia. 652; 48 N. W. Rep. 1046; *O'Brien v. Tatum*, 84 Ala. 186; 4 So. Rep. 158; *Clopp v. Mear*, 134 Pa. St. 203; 19 At. Rep. 504; 25 W. N. C. 571, and other authorities.)

One who comes upon premises in acceptance of an invitation has a right to assume that there are no pitfalls. (*Howe v. Ohmart*, 7 Ind. App. 32; 33 N. E. Rep. 466.) The measure of duty is "reasonable prudence and care." (*Larkin v. O'Neill*, 119 N. Y. 225; 23 N. E. Rep. 563, reversing 48 Hun, 591; 1 N. Y. Sup. 232. See *Emery v. Minneapolis Industrial Exposition*, 56 Minn. 460; 57 E. W. Rep. 1132; see *Nash v. Minneapolis Mill Co.*, 24 Minn. 501.)

**§ 144. Invitation to premises — Limited to parts generally used.** — A person who falls into an elevator shaft in a part of the premises not intended for the public has no cause of action for his consequent injury. (*Turner v. Klekr*, 27 Ill. App. 391; *Rooney v. Woolworth*, 74 Conn. 720; 52 At. Rep. 411; *Zoebisch v. Tarbell*, 10 Allen, 385; *Trask v. Shotwell*, 41 Minn. 66; 42 N. W. Rep. 699; *Massey v. Seller* (Oreg.), 77 Pac. Rep. 397).

But the rule is otherwise where he is directed by a servant on the premises. (*Sheyer v. Lowell*, 134 Cal. 357; 66 Pac. Rep. 307.)

In the case of *Bennett v. Butterfield* (112

Mich. 96; 70 N. W. Rep. 410), the facts were that a customer of a wall paper dealer, in attempting to enter a freight elevator situated in the rear and at one end of the store and intended for employees only, fell down the shaft and was injured. Upon this point, the court said: "The fact is therefore established that plaintiff attempted to enter the elevator without invitation or permission. He alone is responsible for the accident and the injury, and cannot recover." Citing *Bedell v. Berkey*, 76 Mich. 435; 15 Am. St. Rep. 370; *Pelton v. Schmidt*, 97 Mich. 231; *Severy v. Nickerson*, 120 Mass. 306; 21 Am. St. Rep. 514; *Victory v. Baker*, 67 N. Y. 366; *Gibson v. Sziepienski*, 37 Ill. App. 601.

In *Peake v. Buell* (90 Wis. 514; 63 N. W. Rep. 1053), the material facts were that a plasterer visited an upper floor of a building to make a bid on plastering some unfinished rooms therein and was killed by an elevator, operated by the tenant, while looking through an unguarded window opening from the hallway into the elevator shaft. In denying the liability of the owner of the building for the injury the court said: "The invitation to the hallway gave him no license to protrude himself through the window. The elevator was operated by the defendant's tenants, and not by him. The defendant owed the deceased no duty in respect to the operation of the elevator."

§ 145. **Invitation to premises — Limited to parts generally used — Cowen v. Kirby.** — In *Cowen v. Kirby* (180 Mass. 505; 62 N. E. Rep. 968), the facts were in brief that the plaintiff drove his horse and wagon into a public stable and got out of the wagon. Hostlers unhitched the horse and backed the wagon to the wall opposite the entrance. The plaintiff followed the wagon back and put his driving gloves into it, and upon receiving a numbered check for his team left the stable. After some hours he re-entered by the door for carriages and walked across the room intending to place some packages in his wagon which remained where he had seen it placed. About two feet from his wagon was a post, and not choosing to pass between the wagon and the post he swung himself around the post, which was in fact a part of the apparatus of a machine used to hoist vehicles to the upper floors. The hoist loaded with a vehicle descended upon and injured him. The Superior Court ordered a verdict for the defendants, to which the plaintiff excepted.

In overruling the exceptions, the Supreme Court, through Barker, J., said: "The fact that a person enters a place of business does not give him the right to expect that every part of the premises shall be so arranged and kept that he may be in safety. He knows the



purpose for which they are used and must assume that they will be prepared and adapted for that purpose, and must take notice of that preparation and adaptation at least so far as it is obvious. It is only those parts of the premises where customers are expected to be that the owner or occupant must keep in a suitable condition for them, and in such parts only has a customer a right to assume that care has been used to protect him from injury. He enters knowing that the place is not arranged merely for his own convenience. He may expect that he will be safe in conducting himself as a customer is expected to act, but he has no right to expect that he will be safe if he oversteps that limit. The owner without being in fault may adapt his premises to his business and may use them in the way for which they were designed, unless in so doing he exposes the customer to some danger which the latter has the right to expect he will not be exposed to, and the customer must expect to find such appliances and such uses of the premises as are involved in the prosecution of the business. If without some special invitation, express or implied, a customer sees fit to pass from that part of the establishment where it is designed and expected that he shall be into other parts not designed or adapted for his use, but for the work of the place, he becomes at best a mere licensee, as to whom

the owner or occupant has no duty to keep his premises safe. *Severy v. Nickerson*, 120 Mass. 306; *Gaffney v. Brown*, 150 Mass. 479; *Marwedel v. Cook*, 154 Mass. 235. See *Redigan v. Boston and Maine Railroad*, 155 Mass. 44; *Plummer v. Dill*, 156 Mass. 426, 428, 429; *McCarvell v. Sawyer*, 173 Mass. 540; *Moffatt v. Kenny*, 174 Mass. 311; *Harabine v. Abbott*, 177 Mass. 59."

§ 146. **Invitation to Premises — Unexplained injury.** — The doctrine of *res ipsa loquitur*, heretofore referred to (see *ante*, §§ 60, 61, 84, 93, 94) may or may not be applicable to a case where a person, who has been invited to come upon the premises, is injured in an unexplained manner. This subject is discussed by the court in the case of *Arnold v. Green* (95 Ind. 217; 52 At. Rep. 673), where the material facts were that the defendants were dealers in woolen yarns and that the plaintiff's husband had been in the habit for some years of visiting their establishment for the purpose of making purchases. The only means of access to the fourth floor was a hydraulic elevator which as it goes up to the upper floors, comes within the doors or coverings the hatchways; and, as it reaches each floor lifts the covering or door and takes it up to the top; as the elevator comes down it leaves these doors or portions of the floor at their

appropriate places, thus closing the aperture through which it moves in ascending and descending. The deceased was shown some goods on the fourth floor and requested to shake one of the ropes in the shaft as a signal when he wished to use the elevator to come down. Shortly afterwards he was found in a dying condition on the elevator platform below the fourth floor where the guard rail was down, although the evidence does not disclose who opened or removed it.

In holding that the plaintiff was not entitled to recover damages the court said upon the subject of *res ipsa loquitur*: "All we can discover by the evidence is that the injury happened, but how it happened we are not informed, and unless we are prepared to adopt the suggestion that the maxim *res ipsa loquitur* is applicable to this case or to hold that the mere happening of the accident without any evidence to show it resulted from want of care on the part of the defendants, raises a presumption of their negligence, the conclusion is inevitable that the case was properly taken from the jury. In 2 Shearman and Redfield on the Law of Negligence, Sec. 704, in discussing the subject of liability to *business visitors* it is said that the mere fact that one is injured while on the premises is no evidence of negligence on the part of the proprietor. *Benedick v. Potts*, 88 Md. 56. *Holmes*,

C. J., says in *Pinney v. Hall*, 156 Mass. 225, which was an action by a customer to recover damages for injury caused by falling down a stairway: 'This is a naked case of a person tumbling downstairs and unless it can be said that *res ipsa loquitur* applies the judge was right in his ruling. What is meant by *res ipsa loquitur* is, that the jury are warranted in finding from their knowledge as men of the world that such accidents usually do not happen except through the defendant's fault, and therefore in inferring that this one happened through the defendant's fault unless otherwise explained. But that depends on the kind of accident. With regard to this kind we are of opinion that a jury would not be warranted in laying down such a premise or in drawing such an inference.' "

§ 147. **Invitation to premises — Trapdoors.** — In the case of *Pelton v. Schmidt* (104 Mich. 345; 62 N. W. Rep. 552; 53 Am. St. Rep. 462; s. c. 97 Mich. 231; 56 N. W. Rep. 689) a teamster, after delivering some goods at the back door of a store, started towards a desk near the middle of the room to get a receipt. He fell down into a trapdoor, and sustained injuries for which he sued the owner of the store. Hooker, J., in delivering the opinion of the court, said: "The defendants might lawfully keep and use the trapdoor in their store, sub-

ject to their duty to properly guard the same to avoid injury to those persons who should lawfully come into that portion of the store where it was located. This was a duty owing to all persons lawfully there under an express or implied invitation from the owners, upon business concerning the defendants, excepting employees about the premises, or persons having notice of the existence of the trap. In *Shear. & R. Neg.*, § 719, it is said that: 'Such openings, unless far removed from those parts of the building which are lawfully used by persons *not having actual notice* of their existence, should be thoroughly fenced in, so that no one exercising ordinary prudence could fall through them. If it is impracticable to keep up a fence, as it sometimes is, for example during the hoisting and delivery of goods through a hoisting, the person using it is bound to give actual notice of the danger to every person lawfully approaching the place, or in default thereof, he is liable for injuries resulting therefrom.'

"This language was quoted with approval by Mr. Justice Cahill in the case of *Engel v. Smith*, 82 Mich. 1, 5, where it was held that the opening of a trapdoor in a frequented place imposed the duty of guarding it, not to do which constituted negligence as matter of law. The trapdoor mentioned in the case was in a

back room, through which the plaintiff was accustomed to pass to and from his room.

"The character of the plaintiff's mission upon the premises does not except him from the rule. He was not an employee of the defendants working in and about the store, and therefore bound to assume the risks incident to the character of the premises. He went there on business of the defendants and his employer, by directions of the latter. In that respect the case resembles that of *Indermaur v. Dames*, L. R. 1 C. P. 274, and L. R. 2 C. P. 311, where this subject is discussed. See *Cornman v. Railway Co.*, 4 Hurl. & N. 781; *O'Callaghan v. Bode*, 34 Cal. 489. The jury having found the invitation to enter and cross the premises, it was the duty of the defendants to give plaintiff notice of the trap, if he was not already aware of its existence, — a fact that the jury might well have found from the testimony, if they did not. The question was, however, for them, and not for the court to decide, being disputed." (See *Zoebisch v. Tarbell*, 10 Allen, 385.)

**§ 148. Mail carriers may enter buildings. —** Where the tenants of the upper stories of a building maintain boxes for the reception of their mail in the lower hallway, which is controlled by the owners of the building, and the letter-carrier who enters the hallway for the purpose

of placing mail in the boxes is injured by falling into the elevator well, it was held, that the jury are authorized to find that he enters by the implied invitation of such owners, and it is immaterial that the building is used for workshops and not offices. (*Gordon v. Cummings*, 152 Mass. 513; 9 L. R. A. 640. See *Morrison v. Metropolitan Tel. Co.*, 52 N. Y. St. Rep. 601. See, *ante*, § 36. And see *Thompson Neg.*, § 1076.)

But policemen and firemen are only licensees. (See, *ante*, §§ 17-20.)

§ 149. **Tenants have easement.** — Tenants have an easement in the right of ingress and egress (see *Totten v. Phipps*, 52 N. Y. 354), and to the general use of the premises without exposure to unusual dangers of personal injury. (*Hirst v. Ringen Real Estate Co.*, 169 Mo. 194; 69 S. W. Rep. 368; *McGill v. Compton*, 66 Ill. 321; *South Bend Iron Works v. Larger*, 11 Ind. App. 370. See, *ante*, §§ 75, 76, 106, 107.)

And to the use of a dumb-waiter for the delivery of supplies. (*Vandicar v. Universal Trust Co.*, 80 N. Y. Sup. 290; 80 App. Div. 274.)

§ 150. **Trespassers.** — The general rule of law is that a trespasser can only recover for

injuries wantonly inflicted (see, *ante*, § 17), and for those which the owners of the premises could have prevented by the exercise of due care when they either know or should have known of his danger. (*Leavitt v. Mudge Shoe Co.*, 69 N. H. 597; 45 At. Rep. 558; *Lackat v. Lutz*, 94 Ky. 287; *Chicago, etc., Co. v. Collins*, 43 Ill. App. 478.)

Thus, one who rides upon an elevator, which he knows has been forbidden, cannot recover for ordinary injuries resulting therefrom. (*Leavitt v. Mudge Shoe Co.*, *supra*; *Springer v. Byram*, 137 Ind. 15; 23 L. R. A. 244; 36 N. E. Rep. 361; *Long v. Mutual Life Insurance Co.*, 72 N. Y. Sup. 665; 66 App. Div. 91; *Ingram v. Fosburgh*, 76 N. Y. Sup. 344; 73 App. Div. 129. And see, *post*, § 155.)

Where some boys came upon premises after the workmen had gone and by swinging on the head rope of a derrick caused it to break injuring one of their number, the owner is not liable. (*Conway v. Vezzette*, 69 N. J. Law, 235; 54 At. Rep. 226.)

§ 151. **Minor trespassers.** — A newsboy who had been forbidden to ride in a passenger elevator cannot recover for injuries received while attempting to board the car, unless he was willfully injured. (*Springer v. Byram*, 137 Ind. 15; 23 L. R. A. 244; 36 N. E. Rep. 361.)



But the rigid rule against trespassers is relaxed to some extent in its application to children. Thus, in *City of Pekin v. McMahon* (154 Ill. 141), the court said: "Although a child of tender years who meets with an injury upon the premises of a private owner may be a technical trespasser, yet the owner may be liable if the things causing the injury have been left exposed and unguarded, and are of such character as may be an attraction to the child, appealing to his childish curiosity and instincts. Unguarded premises which are thus supplied with dangerous attractions are regarded as holding out implied invitations to such children."

This case is quoted from and approved in *Siddall v. Jansen*, 168 Ill. 43. (See, also, *Guichard v. New*, 84 Hun, 54; 31 N. Y. Sup. 1080; *s. c.* reversed 65 N. Y. St. Rep. 20.)

Where a child four years and six months old was caught and crushed by the descending car of a steam elevator in a coal yard, near the sidewalk, and it appeared that the sliding door between the elevator and the street was left open, it was *held* improper to grant a nonsuit. (*Mullaney v. Spence*, 15 Abb. Pr. (N. S.) 319.)

§ 152. **Statutes no protection to trespassers.** — The provision of the Laws, N. Y., 1887, ch. 462, entitled: "An act to regulate the employment of women and children in manufacturing

establishments, etc.," which, at sec. 8, requires the protection of elevator holes, was not intended to protect persons entering such premises without business or invitation and imposes upon the proprietors of manufacturing establishments no duty towards such persons (*Flannigan v. American Glucose Co.*, 11 N. Y. Sup. 688; 33 N. Y. St. Rep. 867.)

**§ 153. Rules — Duty to establish.** — A master who employs servants in carrying on a dangerous or complex business should have the prudence and caution for their safety to establish and promulgate rules whereby the business shall be conducted. (*Poindexter v. Paper Co.*, 84 Mo. App. 352; *Wagner v. New York, C. & St. L. R. Co.*, 78 N. Y. Sup. 696; 76 App. Div. 552.)

In a case where an employee undertook to put on the belt of a pulley by which an elevator was operated but was caught by a screw set projecting from the shaft around which was the pulley, and there were no posted rules forbidding the men to put on the belt when it came off, which for a number of years various workmen had been more or less in the habit of putting on when it came off, it was held that as a matter of law it could not be held that a verdict for the plaintiff should not stand. (*Daley v. American Print-*

ing Company, 152 Mass. 581; 26 N. E. Rep. 135.)

§ 154. **Effect of prohibitory notice.** — Notices either verbal or written, direct or by placards posted in conspicuous places, may be given by the owners or operators of elevators to persons forbidding the use of such elevators. One who knowingly violates such notices becomes in effect a trespasser and assumes the risks of injury. Where the owner or operator intends to enforce and rely upon such notices, it is his duty to see that every person ordinarily having the right to ride upon the elevator is either notified in person or has a reasonable opportunity of seeing and reading the posted notice or notices. (See *Hunsen v. Schneider*, 58 Hun, 60; 11 N. Y. Sup. Rep. 347; *Springer v. Byram*, 137 Ind. 15; 23 L. R. A. 244; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93; 64 N. E. Rep. 726; *Connors v. Merchants Mfg. Co.*, 184 Mass. 466; 69 N. E. Rep. 218. And see, *ante*, § 151.)

In the case of *Patterson v. Hemenway* (148 Mass. 95), where an elevator, bearing the inscription: "This elevator is for freight only, not for passengers," had been repeatedly used by a boy without invitation in doing errands to the top of the building, he having never found any one at the elevator to operate it but having

been twice told by persons employed at the top of the building not to use it, and he went to it on the day of the accident, entered alone and went up closing the door at the top floor behind him, knowing that any one below wishing to use the elevator could do so by lowering it with the rope used to operate it. In about five minutes he returned in a great hurry, opened the door, and turning quickly toward some one speaking to him and without looking at the elevator well he stepped out into it. The elevator having been in the meanwhile lowered he fell and was injured. It was held that he was guilty of such contributory negligence as to preclude him from maintaining the action.

§ 155. **Effect of prohibitory notice — Ball v. Hauser.** — In *Ball v. Hauser* (129 Mich. 397; 89 N. W. Rep. 49; 8 Det. Leg. N. 1014) the court said: "Thus far the practice of permitting an employee to disregard a definite and known rule, and recover damages notwithstanding the fact, seems to have been confined to railroad cases in this State. In this case it is sought to apply it to another kind of a case. The exigencies of railroading may be such as to justify an employee in assuming that a rule is abrogated without inquiry of the employer before disregarding it. Whether we should say the same in a case like this may be open to grave

doubt. Whatever we might conclude were it necessary to pass upon the question, it is apparent from the cases cited that, even in railroad cases, recovery is permitted only when the testimony shows that the rule has been abrogated, and this may be inferred from the circumstances fairly establishing it."

§ 156. **Freight elevators used for passenger service.** — Sometimes freight elevators are used for the carriage of passengers and in such instances the operator owes to the passengers the same degree of care that is required of operators of regular passenger elevators. The physical construction of a freight elevator is such that from its very nature passengers upon it assume greater risks than when riding on a regular passenger elevator and the operator is required to observe a corresponding degree of care. The duty is similar to that owing to passengers riding on a freight train. (Springer v. Ford, 189 Ill. 430; 52 L. R. A. 930; 59 N. E. Rep. 953, affirming 88 Ill. App. 529; Frolich v. Cranker, 21 Ohio Cir. Ct. R. 615; 11 O. C. D. 592; Stewart v. Harvard College, 12 Allen (Mass.), 58; Beidler v. Branshaw, 200 Ill. 425; 65 N. E. Rep. 1086; Hubenir v. Heide, 76 N. Y. Sup. 758; 73 App. Div. 200; Poindexter v. Paper Co., 84 Mo. App. 352.)

**§ 157. Passengers riding on freight elevators.—**

As above intimated, owners of land are under very limited obligations to those who go upon it without invitation of some sort. Trespassers enter at their own peril. An example of quite frequent occurrence and which seems to come under this rule, is that of persons riding upon freight elevators which they know are intended exclusively for the carriage of freight. When this is done without the knowledge and consent of the owner he is not liable for injuries which may result. (*Gibson v. Leonard*, 143 Ill. 182; 37 Ill. App. 344; 17 L. R. A. 588; *Patterson v. Hemenway*, 148 Mass. 94; *Snyder v. Natchez R. R. & T. R. Co.*, 42 La. Ann. 302; *O'Brien v. Western Steel Co.*, 100 Mo. 182; 18 Am. St. Rep. 536; *Ingram v. Fosburgh*, 76 N. Y. Sup. 344; 73 App. Div. 129; *Sievers v. Peters Box &c. Co.*, 151 Ind. 642; 8 Am. & Eng. Corp. Cas. (N. S.) 629; 50 N. E. Rep. 877, rehearing denied in 151 Ind. 662; 1 Rep. 420; 52 N. E. Rep. 399; *Morris v. Brown*, 111 N. Y. 318; *Hall v. Murdock*, 114 Mich. 233; 72 N. W. Rep. 150; *Kern v. DeCastro &c. Sugar Ref. Co.*, 125 N. Y. 50; *Hall v. Murdock*, 114 Mich. 233; *s. c.* 4 Det. L. N. 554; 72 N. W. Rep. 150; *Malloy v. New York Real Est. Assoc.*, 13 Misc. Rep. 496; 34 N. Y. Sup. 679. See 23 L. R. A. 155; 25 *Id.* 34.)

In *McCarthy v. Foster* (156 Mass. 511; 31 N. E. Rep. 385), the court reviewed the facts and concluded as follows: "The elevator with which he (plaintiff) fell was for merchandise only. He had operated it for years, and was perfectly familiar with its construction and its use. He knew that all persons were forbidden to pass up or down upon it, by notices plainly posted, and with which he was familiar. That he and others habitually disregarded them, and rode up and down in violation of them, cannot favorably affect his case against the defendant, as the latter was not in possession of the store, and had no notice that the elevator was used except for merchandise. \* \* \* He used it at his own risk, and for an injury resulting in the act of so using it the defendant was not responsible to him." (See *Wise v. Ackerman*, 76 Md. 375; 25 At. Rep. 424; *McDonough v. Laupher*, 55 Minn. 503; 57 N. W. Rep. 152; 43 Am. St. Rep. 541.)

§ 158. **Trespassers riding in freight elevators — *Henson v. Beckwith*.** — In *Henson v. Beckwith* (20 R. I. 165; 37 At. Rep. 702; 38 L. R. A. 716; 3 Am. Neg. Rep. 95; 2 Chic. L. J. Wkly. 399), plaintiff's intestate, while delivering goods to a tenant of a leased building, upon the tenant's invitation, fell through an opening between the elevator and the outer

wall of the building and was killed. In an action against the owner the court said:—

“Ordinarily, a freight elevator is used by employees. Can it be said that a landlord is bound to know that it will be used by strangers? The tenant and his servants, knowing its condition, may use it carefully and safely. If, then, the tenant invites a stranger to use it, he is the one who should give warning and look out for the safety of his guest. We are unable to see how the landlord, in such a case, can be held responsible, without saying that nobody has a right to let property that is in any way dangerous or out of repair, even though the lessee may be willing to take it as it is and be able to use it with safety, having knowledge of the risk. Such a doctrine would be a serious limitation upon the ownership of real property.

“For these reasons we conclude that, as the building in question was not a nuisance, nor unfit for the purpose for which it was let, by reason of any defect which the landlord may be presumed to know, and as the plaintiff's intestate was not upon the premises by invitation of the defendant, express or implied; and as defendant was not in possession or control of the elevator well, the plaintiff shows no right of action against the defendant.” (See *Cogswell v. Rochester Machine Screw Co.*, 57 N. Y. Sup. 145; 39 App. Div. 223; *Knox v. Hall*



Steam Power Co., 69 Hun. 231; 53 N. Y. Sup. 39; 30 Abb. N. C. 152; 23 N. Y. Sup. 490; *Miller v. Brewster*, 53 N. Y. Sup. 1.)

§ 159. **Riding on freight elevator instead of passenger elevator near by.** — Where both passenger and freight elevators are provided there is an express invitation to take the passenger elevator, and one injured by defects in the freight elevator while riding thereon cannot recover damages of the proprietor. Thus, in *Amerine v. Porteous* (105 Mich. 347; 63 N. W. Rep. 300), under facts similar to those included in the statement just made, the court said: "Plaintiff chose to ride in the elevator which to his knowledge was provided for another purpose, knowing at the same time that a passenger elevator had been provided and was in operation. The invitation extending from the defendants to take the passenger elevator was in its nature express, and the situation negatived any possible inference of an invitation to take the freight elevator."

§ 160. **Improper use of appliances.** — In the case of *Ritterman v. Ropes* (51 N. Y. Super. Ct. 25), the facts were, that the defendant was the owner of a building containing an elevator used to carry goods to the several occupants, the customary mode of raising the goods being

for the party delivering them to stand on the ground floor and raise the elevator, without going up with it. The plaintiff having some goods to deliver placed them on the elevator and while raising the elevator in a jerking and intermittent manner, and looking up the shaft, he was struck by a part of the goods falling upon his head. The court said: "As a matter of law, it could not be determined that the plaintiff could have thought that the way in which he raised the elevator was not such as was necessary to its use." (See *Gray v. Siegel-Cooper Co.*, 79 N. Y. 813; 8 App. Div. 118).

**§ 161. Unauthorized entry for business purposes.** — Where a person went into the factory of another to find an employee of the latter who usually attended to some business for the former, and passed into a portion of the building from which employees were excluded, where, being directed by an employee, the place being dark, he proceeded and fell into an elevator hole and was injured, the court held that the factory owner was under no duty to such person to guard the elevator hole, that the direction by the employee did not create such obligation and that no recovery could be had for the injury (*Flannigan v. American Glucose Co.*, 11 N. Y. Sup. 688; 33 N. Y. St. Rep. 867; see *Lackat v. Lutz*, 94 Ky. 287; 22 S. W. Rep. 218; *Faris*

v. Hoberg, 134 Ind. 269; 33 N. E. Rep. 1028; 39 Am. St. Rep. 261; Hinds v. Breckenridge Co., 16 Ohio Cir. Ct. Rep. 12; 8 Ohio Cir. Ct. Dec. 231; Muench v. Heinemann, 119 Wis. 441; 96 N. W. Rep. 800). Again, where plaintiff's intestate, having a son in the employment of the defendants, in carrying his dinner to him, entered a passage way on the defendant's premises, where there was an unguarded elevator shaft, and falling therein, was killed, it was held that, in the absence of any express invitation to enter upon the premises, the defendant was not liable (Gibson v. Sziepienski, 37 Ill. App. 601).

But one who in the regular course of his business enters a building for the purpose of delivering goods to a tenant is entitled to find reasonably safe premises (Wright v. Ferry (Mass.), 74 N. E. Rep. 328).

§ 162. **Unauthorized entry to visit.** — In *McCarvell v. Sawyer* (173 Mass. 540; 54 N. E. Rep. 259, citing *Gaffney v. Brown*, 150 Mass. 479; and *Blatt v. McBarron*, 161 Mass. 21), the facts were that a woman desiring to visit a friend went to a building and inquired for her friend of a tenant who told her to enter and inquire for herself. While walking along a passageway she fell down an elevator well and was injured. She was in fact in the wrong building.

It was held that there was no intention to enter and the owner was not liable.

**§ 163. Intervention of stranger, excuses owner.**

Where a well was dug in the land of another without his knowledge or consent, he is not liable for an animal which falls into it and is killed. (Illinois Central R. R. Co. v. Carraher, 47 Ill. 333.) The owner of a well uncovered by a stranger without the owner's knowledge is not liable for the death of a child which strayed away from home and fell into the well. (Spokane & P. Ry. Co. v. Holt, 40 Pac. Rep. 56. See, *ante*, § 22.)

**§ 164. Landlord not liable to tenant, when. —**

Where an elevator was kept locked and the key left in the proper place, and a tenant improperly procures another key, unlocks the elevator and leaves it open without the knowledge or consent of the landlord, the landlord is not responsible for any consequential injuries to the tenant. (Handyside v. Powers, 145 Mass. 123.)

## CHAPTER V.

### PLEADINGS AND PRACTICE.

- § 165. Parties.
- § 166. Declaration.
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- § 170. Burden of proof.
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- § 172. Statement of attorney.
- § 173. Province of jury.
- § 174. Directing verdict.
- § 175. Nonsuit.
- § 176. New trial.
- § 177. Appeal.

§ 165. **Parties.** — The determination of questions as to who should be and who should not be made parties to a lawsuit involving either the construction or operation of elevators does not differ in principle from the usual rules of pleading and practice laid down in the books and promulgated by the courts. Persons wronged or their legally competent representatives should be of course made plaintiffs in the lawsuit, and likewise all persons liable should be made defendants. Where an elevator has been constructed by a contractor,

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upon the premises of another person, and operated by a third party, as lessee, it may become material to determine exactly who is responsible to still another party who is injured. The principles governing liabilities in such causes have been heretofore discussed and should be given consideration in drawing the declaration. (See *ante*, §§ 23-29, 73-76, 106, 107.)

Thus, in *Luckel v. Century Building Company* (177 Mo. 608; 76 S. W. Rep. 1035), a trustee in possession under the terms of a mortgage for the purpose of collecting the rents of a building and otherwise performing his duties under the terms of the mortgage, was held to be not liable to a person injured by an elevator in the building but merely an agent for the mortgagor, who was liable.

§ 166. **Declaration.** — In stating a cause of action at common law for an injury caused by the defective construction or condition of an elevator it is necessary to allege: —

First, that the particular method, material or appliance was unreasonable, or unsuited, or defective, describing the same specifically, together with the manner in which the plaintiff was injured.

Second, that the defendant knew or should have known these facts, showing the circumstances upon which this allegation is based.

Third, that the plaintiff did not know these facts and had not equal means of knowing them.

Fourth, the amount of damages sustained by reason of the injury, particularly alleging any special damages. (*Malone v. Hawley*, 46 Cal. 409; *Black v. Ontario Wheel Co.*, 19 Ontario Rep. 578.) Thus, in *McGonigle v. Kane* (20 Colo. 292; 38 Pac. Rep. 367), a statement was held to be sufficient where it described the construction of the elevator and of the floor-fastenings, and alleged that the defendant had failed to supply safe appliances, constructed the elevator in a negligent manner, and used unsuitable and unsafe materials rendering the elevator unfit for its intended use; that the accident was caused by the elevator breaking from its fastenings and falling, describing the details of the accident, pointing out the particular defects which caused the accident, and alleging that the defendant had knowledge of the defects but the plaintiff was ignorant of their existence.

The plaintiff's declaration in a case involving personal injury by an elevator is sufficient where it clearly states the injury received, without specifically setting forth the details or charging its permanency or seriousness. (*Springer v. Schultz*, 105 Ill. App. 544; affirmed in 205 Ill. 144; 68 N. E. Rep. 753. See *Indiana, etc., Coal Co. v. Buffey*, 28 Ind.

App. 108; 62 N. E. Rep. 279; Commercial Club v. Hilliker, 20 Ind. App. 239; 5 Am. Neg. Rep. 153, note; 60 N. E. Rep. 578; Pardridge v. Gillbride, 98 Ill. App. 134; Bullock v. Butler Exchange Company, 24 R. I. 50; 52 At. Rep. 122; Bair v. Heibel, 103 Mo. App. 621; 77 S. W. Rep. 1017; Mann v. O'Sullivan, 126 Cal. 61; 6 Am. Neg. Rep. 417; Franklin Printing and Publishing Company v. Behrens, 80 Ill. App. 313; Anderson v. Hayes, 101 Wis. 520; 77 N. W. Rep. 903; Alexander v. McGaffey (Tex. Civ. App.), 88 S. W. Rep. 462.)

But negligence in fact or in substance must be alleged or the declaration will be held to be insufficient. (McCarty v. Rood Hotel Co., 54 Mo. 397; 46 S. W. Rep. 172; Barron v. Missouri Lead and Zinc Co., 172 Mo. 228; 72 S. W. Rep. 534; Rietman v. Bangert, 26 Ind. App. 468; 59 N. E. Rep. 1080; Durell v. Hartwell, 26 R. I. 125; 58 At. Rep. 448.)

§ 167. **Pleas.** — Where a rule or the violation of a rule (Horton v. Ft. Worth Packing and Provision Co. (Tex. Civ. App.), 76 S. W. Rep. 211; see *ante*, § 153) or a statute is relied upon as a defense, it must be specifically pleaded (see Bair v. Heibel, 103 Mo. App. 621; 77 S. W. Rep. 1017; and see *ante*, §§ 43, 53); but it is sufficient if the substance and general



tenor of the statute or ordinance are set out, with references to the chapter, article and section of the compilation wherein the specific provisions can be found upon examination. (Hirst v. Ringen Real Estate Co., 169 Mo. 194; 69 S. W. Rep. 368.)

§ 168. **Proof of case.** — What evidence is necessary to prove the plaintiff's case depends upon the circumstances peculiar to each case but must conform to the usual rules of evidence. (See Kennedy v. McAllaster, 31 App. Div. 453; White v. Eidlitz, 46 N. Y. Sup. 184; 19 App. Div. 256; Lambrecht v. Pfizer, 63 N. Y. Sup. 591; 49 App. Div. 82; 7 Am. Neg. Rep. 506, note; Ferris v. Aldrich, 19 N. Y. Sup. 353; 47 N. Y. St. Rep. 40. And see Dallemund v. Saalfeldt, 75 Ill. 310; 51 N. E. Rep. 645; 17 Nat. Corp'n Rep. 439, aff'g 73 Ill. App. 151; See also *ante*, §§ 56 *et seq.*) Thus in Kliebaz v. Middleton Paper Co. (180 Mass. 363; 62 N. W. Rep. 371) it is held that the plaintiff need not specifically prove the act or omission which caused his injury, provided he instances evidence from which negligence may be safely inferred. (See Stewart v. Van Deventer Carpet Co., (S. C.) 50 S. E. Rep. 562.)

To recover damages for injuries received from an elevator on another's premises the plaintiff must offer proof which will justify the jury in

finding that he came upon the premises by some authority or invitation from the owner, that he was injured on account of the want of due care either in the construction or the management of the elevator and that he was himself exercising due care. If the proof offered is sufficient, if believed, to authorize the jury to find in favor of the plaintiff, the case should be submitted to them. (*Gordon v. Cummings*, 152 Mass. 513; 9 L. R. A. 640.)

§ 169. **Proof of case — Continued.** — Where the evidence is conflicting, a specific finding by the jury will not be disturbed on appeal. (*Mills v. Thomas Elevator Co.*, 66 N. Y. Sup. 398; 54 App. Div. 124; 8 Am. Neg. Rep. 655, following *Murphy v. Dwight*, 161 N. Y. 301, 304; 55 N. E. Rep. 901. See *Hall v. Murdock*, 114 Mich. 233; 72 N. W. Rep. 150; *Auld v. Manhattan Life Insurance Co.*, 54 N. Y. Sup. 222; 34 App. Div. 491.)

Instructions based on the absence of evidence, cannot be granted if there be any evidence legally sufficient to warrant the jury in finding or inferring the fact in controversy. (*Lorentz v. Robinson*, 61 Md. 64. See *Hutchinson v. Reliance Realty Co.*, 78 Mo. App. 614.) But where the trial judge is satisfied that there is no evidence to sustain the verdict it is his duty to so instruct the jury. (*Knapp v. Jones*, 50

Neb. 490. See *Griffin v. Manice*, 62 N. Y. Sup. 364; 47 App. Div. 70; 77 N. Y. Sup. 626; 74 App. Div. 371, affirming 73 N. Y. Sup. 559.) And see *Steinke v. Diamond Match Co.*, 87 Wis. 477; 58 N. W. Rep. 842.)

Evidence to show that failure to have medical attention in a case of personal injury was due to inability to secure such attention was admitted in *Muller v. Hale*, (138 Cal. 163; 71 Pac. Rep. 81.)

And evidence of employees engaged in loading an elevator, should be admitted. (*Conner v. Koch*, 71 N. Y. Sup. 836; 68 App. Div. 257.)

Evidence of a conversation between the plaintiff and her daughter was properly excluded in *Potter v. Cave*. (123 Iowa, 98 N. W. Rep. 563.)

And so were admissions by an agent outside the usual scope of his employment. (*Hall v. Murdock*, 114 Mich. 233; 119 Mich. 389; 78 N. W. Rep. 329; 5 Det. Leg. N. 849. See *Nutzmann v. Germania Life Insurance Co.*, 82 Minn. 116; 84 N. W. Rep. 730.)

But admissions by one of the defendants as to the manner in which an injury was caused, are admissible against all the other defendants. (*Muench v. Heinemann*, 119 Wis. 441; 96 N. W. Rep. 800.)

The credibility of witnesses should be sub-

mitted to the jury. (*Kennedy v. McAllaster*, 31 App. Div. 453; *McGregor v. Reid*, 178 Ill. 464; 6 Am. Neg. Rep. 28; 53 N. E. Rep. 323, reversing 76 Ill. App. 610.)

§ 170. **Burden of proof.** — Of negligence, see *ante*, §§ 66, 96.

Of contributory negligence, see *ante*, §§ 123 *et seq.*

§ 171. **Variance.** — In this subject there is no departure from the strict rule that in a lawsuit the recovery must be within the pleadings and proof. (See *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Boehm v. Mace*, 28 Abb. New Cas. 138; *Nutzmann v. Germania Life Insurance Co.*, 82 Minn. 116; 84 N. W. Rep. 730.)

But as may be seen in the case last cited the variance must be material. Also, a variance cannot be pleaded for the first time on appeal, in a case where it could have been corrected by amendment. (*Union Show Case Co. v. Blindauer*, 75 Ill. App. 358, affirmed in 175 Ill. 325; 51 N. E. Rep. 709.)

§ 172. **Statement of attorney.** — In an action for personal injuries to the plaintiff, sustained by his falling down an elevator shaft, a statement by his attorney in the opening statement of the case that he expects to prove that other

accidents had happened at the same place, is not sufficient ground to reverse the judgment for the plaintiff where the court excludes the evidence offered upon this point. (*Marder v. Leary*, 137 Ill. 319; 26 N. E. Rep. 1093.)

§ 173. **Province of jury.** — It is the province of the jury to pass upon and determine all questions of fact (see *ante*, §§ 34, 43, 123), as, for illustration, whether a servant assumes the risk of the operation of a derrick, which he knows to be unsafe (*Walters v. George A. Fuller Co.*, 77 N. Y. Sup. 681; 74 App. Div. 388), or whether a spring automatically operating the gate of an elevator was out of repair (*Larkin v. Washington Mills*, 61 N. Y. Sup. 93; 45 App. Div. 6.)

The trial court is not required to pass upon every point of law made by counsel but only such as are material. (*C. & C. Electric Motor Co. v. D. Frisbie & Co.*, 66 Conn. 67; 33 At. Rep. 604. See *Griffin v. Manice*, 62 N. Y. Sup. 364; 47 App. Div. 70; 77 N. Y. Sup. 626; 74 App. Div. 371, affirming 73 N. Y. Supp. 559.)

The findings of fact in the court below will not ordinarily be disturbed on appeal. (*Slack v. Harris*, 200 Ill. 96; 65 N. E. Rep. 669, affirming 101 Ill. App. 669.)

§ 174. **Directing verdict.** — It is a well settled rule that the court may withdraw a case from the jury and direct a verdict, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of sound judicial discretion, would be compelled to set aside a contrary verdict. (Del. L. & W. R. R. Co. v. Converse, 139 U. S. 472; Kueckel v. O'Connor, 76 N. Y. Sup. 829; aff'g 73 N. Y. Sup. 546; 36 Misc. Rep. 335; Illinois Third Vein Coal Co. v. Cioni (Ill.), 74 N. E. Rep. 751; Hensler v. Stix (Mo. App.), 88 S. W. Rep. 109.)

§ 175. **Nonsuit.** — In Lee v. Knapp & Company (137 Mo. 385; 38 S. W. Rep. 1107; 155 Mo. 610; 56 S. W. Rep. 458), the court, "In passing upon an application to nonsuit the plaintiff, which is but a demurrer to the evidence offered in plaintiff's behalf, every influence of facts in favor of the plaintiff from the evidence, which the jury might have inferred with any reasonable degree of propriety, the court must indulge."

§ 176. **New trial.** — Where the verdict is contrary to the weight of evidence it will be set aside and a new trial granted. (Bays v. Warren Featherbone Co., 131 Mich. 205; 91 N. W. Rep. 164; Lee v. Knapp & Co., 155 N. W. 610; 56 S. W. Rep. 458.)

Newly discovered evidence is not sufficient to warrant the setting aside of a verdict where it is merely cumulative and contradictory. It must be of such character and importance as should on another trial justify an opposite verdict on the merits. (Springer v. Schultz, 105 Ill. App. 544; affirmed in 205 Ill. 144; 68 N. E. Rep. 753. See Hawley v. Wright, 34 Nova Scotia, 365.)

§ 177. **Appeal.** — In assigning errors in a motion for a new trial they must be specified or they are waived; but there need not be an independent assignment of error in overruling a motion to submit particular interrogatories. (Rhodius v. Johnson, 24 Ind. App. 402; 56 N. E. Rep. 942.)

## CHAPTER VI.

### DAMAGES.

- § 178. General rule.
- § 179. Assessing damages.
- § 180. Measure of damages.
- § 181. Excessive damages.
- § 182. Release obtained by fraud.

§ 178. **General rule.** — For negligence in the construction or operation of an elevator which results in injury to a person free from contributory negligence, actual damages may be recovered. If the negligence was willful, punitive or exemplary damages may be had; and generally willfulness will be presumed from recklessness or gross carelessness. Special damages must be particularly alleged or they cannot be proved and recovered. Thus, in *Treadwell v. Whittier* (80 Cal. 579; 5 L. R. A. 498), it was held in effect, that where the plaintiff's statement sets out the particular manner in which he was injured all damages which necessarily result from the injury, such as the impairment or loss of capacity to attend to business, may be proved and recovered under the general *ad damnum* allegation. Damages naturally, although not necessarily consequential, must be specifically

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alleged, or they cannot be proved. (See *Franklin Printing and Publishing Co. v. Behrens*, 80 Ill. App. 313.)

§ 179. **Assessing damages.** — In assessing damages to an employee from the negligence of his employer, it is competent for the jury to consider the plaintiff's health and physical ability to support himself and his family before the accident, compared with his condition in such particulars, afterwards; also his physical and mental suffering, his loss of time and how far the injury was permanent in its character, and allow damages accordingly. But it is not competent for the jury to consider the "plaintiff's condition in life — that is whether he is rich or poor." (*Malone v. Hawley*, 46 Cal. 409. See *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233; 73 Pac. Rep. 163; *Beard v. Skelton*, 113 Ill. 584; 13 Ill. App. 54.)

Thus, it is competent to prove the age of the parents at the time of their deaths as indicative of the health and longevity of the plaintiff's intestate. (*Rincicotti v. John J. O'Brien Contracting Co.* (Conn.), 60 At. Rep. 115.)

§ 180. **Measure of damages.** — The question of damages is a pecuniary one, and loss of solatium is no foundation for a recovery. (*Commercial Club v. Hilliker*, 20 Ind. App. 239; 5

#### DAMAGES.

Am. Neg. Rep. 153, note ; 50 N. E. Rep. 578.) Where a small boy's "heel was painfully mashed, the small bone of his leg broken, the leaders strained and shortened," and his leg bruised and injured, so that he was necessarily placed in a plaster-paris bandage for some weeks, and after that in a sole-leather bandage, and finally, when out of bed, long continued walking hurt his leg, it was held that \$500 damages for the injury was not excessive. (Kentucky Hotel Co. v. Camp (Ky.), 30 S. W. Rep. 1010.)

Where an able-bodied man was so injured as to prevent him from continuing his business, and to disable him from engaging in any active occupation, \$30,000 was held not excessive. (Smith v. Whittier, 95 Cal. 279. See Union Warehouse Co. v. Prewitt, 21 Ky. L. Rep. 67 : 50 S. W. Rep. 964 ; Haymarket Theater Co. v. Rosenberg, 77 Ill. App. 184 ; Goldsmith v. Holland Building Co., 182 Mo. 597 ; 81 S. W. Rep. 1112 ; Stomne v. Hanford Produce Co., 108 Iowa, 137 ; 78 N. W. Rep. 841 ; Luekel v. Century Building Co., 177 Mo. 608 ; 76 S. W. Rep. 1035.)

So a verdict for \$10,000 for having caused the death of a strong man, in good health, having an expectancy of sixteen years, is not excessive. (Rosenbaum v. Shoffner, 98 Tenn. 624 ; 40 S. W. Rep. 1086.)

But a verdict for \$25,000 for the death of a

steel worker twenty-nine years of age and earning three and a half dollars a day, was held to be excessive. (*Schmidt v. Metropolitan Life Insurance Co.*, 34 N. Y. Sup. 318; 13 App. Div. 120.)

§ 181. **Excessive damages.** — The court's duty is to determine what constitutes excessive damages and when the verdict of the jury awards excessive damages, a new trial should be granted, unless the plaintiff will consent to a remittitur reducing the amount to a reasonable sum. (*Mitchell v. Marker*, 62 Fed. Rep. 139. See *Commercial Club v. Hilliker*, 20 Ind. App. 239; 5 Am. Neg. Rep. 153, *note*; 50 N. E. Rep. 578. And see authorities cited in the last preceding section.)

§ 182. **Release obtained by fraud.** — A release of claim for damages, obtained by fraud and duress from a chambermaid injured in an elevator in a hotel, is invalid. (*The Oriental v. Barclay*, 16 Tex. Civ. App. 193; 41 S. W. Rep. 117.)

## APPENDIX.

On the following pages is a digest and compilation of the statute laws of the several States regulating the construction and operation of elevators of freight and passengers.

### ALABAMA.

**Safety catches attached to cages.** — Approved safety catches shall be attached to the cage used for the purpose of hoisting and lowering persons into and out of mines. An adequate brake shall be attached to every machine for lowering and hoisting persons into and out of mines and also props and indicators which shall show to the person who works the machine the position of the cage or load in the shaft or on the roadway. Code, 1896, Sec. 2926.

### ARKANSAS.

**Protection of shaft.** — The owner, agent or operator of every mine operated by shaft, shall provide suitable means for signaling between the bottom and top thereof; and shall also pro-

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vide safe means of hoisting and lowering persons in a cage covered with boiler irons, so as to keep safe, as far as possible, persons descending into or ascending out of said mine; and such cage shall be furnished with guides to conduct it along slides through such shaft and with a sufficient brake on every drum, to prevent accident in case of the giving out or breaking of the machinery; and such a cage shall be furnished with spring catches, intended and provided so far as possible to prevent the consequences of cable breaking or loosening or disconnecting of the machinery. Statutes, 1904, Sec. 5342.

#### COLORADO.

**Inclosure of cages and shafts.** — In all shafts equipped with cages, safety-clutches shall be used. In shafts equipped with buckets, shaft-doors must be constructed which will prevent any material falling into the shaft from dumping. Laws, 1903, Ch. 144, Sec. 15.

At all shaft stations a guard rail or rails shall be provided and kept in place across the shaft, in front of the level, so arranged that it will prevent persons from walking, falling or pushing a truck, car or other conveyance into the shaft. Law, 1903, Ch. 144, Sec. 16.

## CONNECTICUT.

**Elevators, wells, hoistways, etc., to be kept safe.** — Section 2266 of the general statutes is hereby amended to read as follows: The inspector of factories may order the opening of all hoistways, hatchways, elevator wells, and well holes, upon every floor of every factory, mercantile establishment, or other building where machinery shall be used, to be protected by good trapdoors, self-closing hatches, and safety catches or other safeguards, such as will insure the safety of the employees in such factory, mercantile establishment, or other building where machinery shall be used, and all due diligence shall be used to keep such trapdoors closed at all times, except when in actual use by an occupant of the building having the use and control of the same.

All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, if considered necessary, by the said inspector, whereby the cab or car will be securely held in the event of accident to the shipper-rope or hoisting machinery, or from any similar cause, and said mechanical device shall at all times be kept in good

working order. Laws of Conn., Pub. Acts, 1893, ch. 118.

**Enclosure of elevator shafts and safety devices.—**

The inspector shall examine all elevators, whether in factories, mercantile establishments, store-houses, workhouses, dwellings, or other buildings, and may order hoistways, hatchways, elevator wells and well holes to be protected by trapdoors, self-closing hatches, safety catches or other safeguards as will insure the safety of all persons therein.

Due diligence should be used to keep such trapdoors closed at all times, except when in actual use by an occupant of the building having the use and control of the same. All elevators, cabs or cars whether used for freight or passengers, shall be provided with some suitable mechanical device, if considered necessary by said inspector, whereby the cab or car will be securely held in the event of accident to the shipper rope or hoisting machinery, or from any similar cause, and said mechanical device shall at all times be kept in good working order. Laws, 1903, ch. 97, Sec. 2.

## ILLINOIS.

**Power of municipallties to regulate. — Sec. 1.**  
Be it enacted by the people of the State of Illinois, represented in the General Assembly: That the city council in cities and the board of trustees in towns and villages, shall have the power to adopt ordinances within their respective limits to provide for the examining, licensing, and regulations of persons having charge or control as starters or operators of all freight and passenger elevators run by hydraulic, electric, steam, water balance, compressed air or any other motive power, and to fix the amount of charges, terms and manner of issuing and revoking licenses to such persons; and to provide that it shall not be lawful for any person or persons to exercise, within the limits of the respective cities, towns and villages which may adopt such ordinances, the business of operating freight or passenger elevators, or the business of controlling the running of such elevator as starters or operators, without a license, and to provide that any person violating the provisions of such ordinance shall be liable to a penalty for each breach thereof.

Sec. 2. Such cities, towns and villages so adopting such ordinance shall have the power



to require that all engaged in such occupation within their jurisdiction shall be of a certain age, and shall submit to an examination by a competent examiner who shall be a practical and experienced elevator starter and operator, or board of such examiners to be appointed by the mayor or president of the board of trustees of such cities, towns and villages touching their competency and qualifications in regard to such occupation, with power to such examiner or board of examiners to license such persons as may be capable and trustworthy in that behalf. Laws, 1903, p. 96.

#### INDIANA.

**Inclosure of elevator shaft — Inspection.** — It shall be the duty of the owner or lessee of any manufacturing or mercantile establishment, laundry, renovating work, bakery, or printing office where there is an elevator, hoisting shaft or well hole, to cause the same to be properly and substantially inclosed and secured, if in the opinion of the chief inspector it is necessary to protect the lives or limbs of those employed in such establishments.

It shall also be the duty of the owner, agent or lessee of such establishment to provide, or cause to be provided, if in the opinion of the chief inspector, the safety of persons in and

about the premises should require it, such proper trap or automatic door so fastened in or at all elevator-ways as to form a substantial surface when closed, and so constructed as to open and close by the action of the elevator in its passage, either ascending or descending, but the requirements of this section shall not apply to passenger elevators that are closed on all sides.

The chief inspector shall inspect the cables, gearing and other apparatus of elevators in establishments above enumerated and require that the same be kept in safe condition with proper safety-devices whereby the cabs or cars will be securely held in event of accident to the cable or rope or hoisting machinery, or from any similar cause. Burns' Revision, 1901, Vol 3, Sec. 7087*e*.

**In building construction.**— If any firm or corporation use or cause to be used any elevating machines or hoisting apparatus in the construction or building of any building or other structure for the purpose of lifting or elevating materials to be used in the construction, such firm, person or corporation engaged in constructing such building, shall cause the shaft or openings in each floor to be inclosed or fenced in on all sides by a barrier of suitable material at least four feet high. Laws, 1903, Ch. 78, Sec. 2.

## MASSACHUSETTS.

**Safety devices.**—Elevator cabs or cars, whether used for freight or passengers, shall be provided with a suitable mechanical device by which they will be securely held in the event of an accident to the shipper rope or hoisting machinery or any similar accident and they shall be guarded and equipped with some attachment or device fastened to the elevator cab or car, elevator well, or floor of the building, which shall prevent any person from being caught between the floor of the cab or car and the floor of the building while attempting to enter or leave the elevator. Elevators used for carrying freight shall be equipped with a suitable device which shall act as a danger signal to warn the people of the approach of the elevator. Elevator wells hereafter built shall be so constructed that that part of the inside surface of the well which comes in front of opening or door of car or cab shall be flush with the cab or car and the door opening from said elevator well into the building shall be placed not more than two inches back from face of said well, so as to allow no space for a foothold between the car and the well door of the building.

All the above construction work and devices shall be approved by the inspectors of factories and public buildings, except that in the city of Boston they shall be approved by the building commissioner, and in other cities by the inspectors of buildings; but upon the approval of said commissioner, or inspector of buildings or inspector of factories and public buildings, any elevator may be used without any or all of such appliances or devices if the nature of the business is such that the necessity for the same will not warrant the expense. Rev. Laws, 1902, Ch. 104, Sec. 27.

**Elevator openings to be protected.** — The openings of all hoistways, hatchways, elevators and well holes upon every floor of a factory or mercantile, or public building shall be protected by sufficient trapdoors or self-closing hatches and safety catches, or such other safety guards as the inspector of factories and public buildings direct, and due diligence shall be used to keep such trapdoors closed at all times, except when in actual use by the occupant of the building who has the use and control of the same. *Id.*, sec. 43. See Acts of 1882, Ch. 208.

**Age of custodians of elevators.** — No person, firm or corporation shall employ or permit any person under fifteen years of age to have the

care, custody, management or operation of any elevator, or shall employ or permit any person eighteen years of age to have the care, custody, management or operation of any elevator running at a rate of speed of over two hundred feet a minute. *Id.* Ch. 106, § 43.

**Boston may regulate elevators.** — The city of Boston may by ordinance regulate the building, management and inspection of elevators, hoistways and elevator shafts, in said city. Acts of 1882, ch. 252, sec. 1.

**Dangerous elevators to be placarded.** — If any elevator whether used for freight or passengers shall in the judgment of the inspector of factories and public buildings of the district in which such elevator is used, or in the city of Boston, of the inspector of buildings of said city, be unsafe or dangerous to use or has not been constructed in the manner required by law, the said inspector shall immediately placard conspicuously upon the entrance to or door of the cab or car of such elevator a notice of its dangerous condition, and prohibit the use of such elevator until made safe to the satisfaction of said inspector. Any person removing such notice or operating such elevator while such notice is placarded as aforesaid, without authority from said inspector, shall be punished by

a fine of not less than ten nor more than fifty dollars for each offense. Rev. Laws, 1902, Ch. 104, § 28.

#### MICHIGAN.

**Shafts to be inclosed, etc.** — It shall be the duty of the owner, agent or lessee of any manufacturing establishment where hoisting shafts or well holes are used to cause the same to be properly and substantially inclosed or secured if in the opinion of the inspector it is necessary to protect the life or limbs of those employed in such establishments. It shall also be the duty of the owners, agent or lessee to provide or cause to be provided such proper trap or automatic doors so fastened in or at all elevator-ways as to form a substantial surface when closed and so constructed as to open and close by action of the elevator in its passage, either ascending or descending. Comp. Laws, 1897, vol. 2, Sec. 5368.

**Automatic doors.** — It shall be the duty of the owner, agent or lessee to provide at all elevator openings in any manufacturing establishment, workshop, hotel or store such proper trap or automatic doors so constructed as to open or close by the action of elevators either ascending or descending. The factory inspector shall ex-

amine such elevators at least once in each year, and more frequently if necessary and require the same to be kept in a safe condition. Public Laws, 1901, p. 158, Sec. 5.

#### MINNESOTA.

**Elevator wells to be inclosed, etc.** — All hoistways, hatchways, elevator wells and wheel-holes in factories, mills, workshops, storehouses, warerooms or stores shall be securely fenced, inclosed or otherwise protected, and due diligence shall be used to keep all such means of protection closed, except when it is necessary to have the same open, that the said hatchways, elevators or hoisting apparatus may be used. All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, whereby the car or cab will be securely held in the event of accident to the shipper-rope or hoisting machinery, or from any similar cause; provided, however, that elevators regularly inspected and insured against loss from personal injuries by any indemnity insurance company authorized to do business in Minnesota shall not be subject to the supervision of the commissioner of labor or the factory inspectors of the State. Gen.

Laws, 1893, ch. 7, Sec. 3, and Laws 1903, ch. 397, Sec. 1.

**Child under certain age, not to run elevator. —** No person, firm or corporation shall employ or permit any child under sixteen years of age to have the care, custody, management or operation of any elevator, or permit any person under eighteen years of age to have the care, custody, management or operation of any elevator running at a speed of over two hundred feet a minute. Gen. Laws, 1895, ch. 171.

**License to operate. —** No person shall hereafter run or operate any passenger elevator in any city having a population of over fifty thousand (50,000) of this State until he shall have been duly registered and licensed to run passenger elevators as hereinafter provided. Laws, 1901, ch. 195, Sec. 1.

#### MISSOURI.

**Elevators and well holes to be protected. —** Openings of all hatchways, elevators and well holes upon every floor of every manufacturing, mechanical or mercantile or public building are required to be protected by good and sufficient



trapdoors or self-closing hatches or safety-catches, or strong guard rails at least three feet high, and all due diligence shall be used to keep such trapdoors closed, except when in use. Rev. Stats. (1899), Sec. 6435.

**Factory Inspector.** — In cities with five thousand inhabitants or more, a factory inspector shall be appointed (*Id.*, Sec. 6431), whose duty it shall be to report offenders of this law (*Id.*, Sec. 6446), who shall be punishable by fine and imprisonment. *Id.*, Sec. 6450.

Office of State factory inspector created. Laws 1901, p. 197. See Laws, 1903, 218.

#### NEVADA.

**Safety devices required.** — It shall be unlawful for any person or persons, company or corporation, to sink or work through any vertical shaft where iron mining cages are used, at a greater depth than four hundred and fifty feet, unless the said shaft shall be provided with an iron bonneted cage, to be used in lowering and hoisting employees. The safety apparatus, whether consisting of eccentrics, springs, or other device shall be securely fastened to the cage, and shall be of sufficient

strength to hold the cage loaded at any depth to which the shaft may be sunk.

Compiled Laws, 1901, Sec. 277.

#### NEW YORK.

**Inclosure and operation of elevators and hoisting shafts.** — If in the opinion of the factory inspector it is necessary to protect the life or limbs of factory employees, the owner, agent, or lessee of such factory, where an elevator, hoisting shaft or well hole is used, shall cause, upon written notice from the factory inspector, the same to be properly and substantially inclosed, secured or guarded, and shall provide such proper traps or automatic doors so fastened in or at all elevator-ways, except passenger elevators inclosed on all sides, as to form a substantial surface when closed and so constructed as to open and close by action of the elevator in its passage either ascending or descending. The factory inspector may inspect the cables, gearing, or other apparatus of elevators in factories and require them to be kept in a safe condition. Heydecker's Gen. Laws and Revised Statutes, 1901. Vol. 2, p. 2620, § 79.

**Child shall not operate elevator.** — No child under the age of fifteen years shall be employed

or permitted to have the care, custody or management of or to operate an elevator in a factory, nor shall any person under the age of eighteen years be permitted to have the care, custody or management of or to operate an elevator therein, running at a speed of over two hundred feet a minute. *Id. Ibid.*

#### OHIO.

**Sliding doors required.** — Each entrance to a passenger elevator shall be provided with a sliding door, with automatic or self-latching lock, accessible only to the person operating the elevator, and in no case shall the person in charge of and running or operating the elevator allow, permit or cause the cab or car of such elevator to be raised or lowered until the door guarding such cab or car entrance has been completely closed and securely latched. Bates Ann. Statutes, 1897, Vol. 1, Secs. 2373-85.

**Mechanical devices.** — All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device to be approved by the inspector of buildings, whereby the cabs or cars will be securely held in the event of accident to the ropes

or hoisting apparatus, or from any similar cause.  
*Id.*, Secs. 2575-87.

**Inspection.**—The inspectors of buildings shall make regulations for the inspection of electric, steam and hydraulic passenger and freight elevators, with a view to the safety of the passengers, and of those operating or using passenger or freight elevators, and shall also prescribe suitable qualifications for persons who are placed in charge of running such passenger or freight elevators. The regulations so made shall require any repairs found necessary upon inspection to be made without delay; and in case defects are found to exist which endanger life by continual use of such elevators, then in either of said cases, upon notice of the inspector of buildings, the use of such elevator shall cease and it shall not again be used until a certificate shall be obtained from the inspector that such elevator has been put in safe order and is fit for use. *Id.*, Secs. 2575-83.

#### PENNSYLVANIA.

**Elevators, lifts, well-holes, etc.** — The owner, agent, lessee, superintendent or other person having charge or managerial control of any establishment, hotel, hospital, apartment house,

or other building where elevators, hoisting shafts, lifts or well-holes are used, shall cause the same to be properly and substantially inclosed, secured or guarded, and shall provide such proper trap or automatic doors so fastened in or at all elevator ways, except elevators inclosed on all sides, as to form a substantial surface when closed, and so constructed as to open and close by action of the elevator in its passage either ascending or descending. The cable, gearing, or other apparatus of elevators, hoisters or lifts, shall be kept in a safe condition; provided, that the provisions of this section shall not apply to cities of the first and second class. Laws, 1905, p. 356, Sec. 12.

**Hoisting shafts and well holes shall be inclosed if inspector so directs.** — It shall be the duty of the owner, agent or lessee of any such factory, manufacturing or mercantile industry, laundry workshop, renovating work or printing office where hoisting shafts or well holes are used, to cause the same to be properly and substantially inclosed or secured, if in the opinion of the inspector it is necessary to protect the life or limbs of those employed in such establishments. It shall be the duty of the owners, agents or lessee to provide or cause to be provided such proper trap or automatic doors, so fastened in or at all elevator ways, as to form a substantial

surface when closed, and so constructed as to open and close by action of the elevator in its passage either ascending or descending. Laws, 1897, p. 31, Sec. 5. See Laws, 1895, p. 129, No. 99. And see Laws, 1893, June 8; P. L. 360, § 28. 1 P. & L. Dig., p. 488, § 45.

**Hoistway, etc., to have automatic trapdoor. —**

In any store, or building, in the city of Philadelphia, in which there shall exist, or be placed, any hoistway, hatchway, elevator, or well hole, or in which there shall be made any opening through the floor, the same shall be properly protected, or covered, by good and sufficient trapdoor, or other such appliances as may be necessary to secure the same from being or becoming dangerous to life or limb, and on the completion of the business of each day, the said trapdoor, or other appliances, shall be safely closed by the occupant having the use and control of the same; any violation of the provision of this act shall subject the offender, or offenders, to a fine of fifty dollars, for each offense, to be recovered with cost of suit, in an action of debt, in any court having cognizance thereof, by, to and for the use of the Philadelphia association for the relief of disabled firemen. 1865, Feb. 16; P. L. 152, § 1. P. & L. Dig., p. 488, § 46.

**No person under fourteen to manage.** — No person, firm or corporation shall employ or permit any minor under the age of fourteen years to have the care, custody, management or operation of any elevator. Any person, firm or corporation, employing any minor under the age of fourteen years to operate, manage or otherwise have the care or custody of an elevator, shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of not less than twenty-five dollars nor more than one hundred dollars. 1893, May 24; P. L. 131, § 1; 1 P. & L Dig., p. 1186, § 225; p. 2306, § 23.

#### RHODE ISLAND.

**Cities and towns may regulate elevators and hoistways.** — The town council of towns and the city council of cities respectively, shall pass ordinances and adopt rules and regulations for the construction, location and operation of elevators and hoistways and the approaches thereto used for the carriage of persons or of merchandise within the limits of their respective towns or cities, and shall provide for the punishment of the persons committing a violation thereof by a fine not exceeding five dollars per day for

each day such violation shall continue. Gen. Laws, 1896, p. 170, Sec. 26.

**Hoisting-shafts to be properly inclosed.** — It shall be the duty of the owner, agent or lessee of any such factory, manufacturing or mercantile establishments, where hoisting-shafts or well holes are used, to cause the same to be properly and substantially inclosed or secured, if, in the opinion of the inspectors, it is necessary to protect the life or limb of those employed in such establishments.

It shall be the duty of the owners, agent or lessee to provide or to cause to be provided such proper trap or automatic doors, so fastened in or at all elevator-ways as to form substantial surfaces when closed, and so constructed as to open and close by action of the elevator in its passage either ascending or descending, if so directed by said factory inspectors or either one of them. Gen. Laws, 1896, p. 229, Sec. 5.

**Automatic warning signals to be attached to elevators not inclosed.** — Every elevator used for conveying persons or goods from one story to another of any building, the well of which elevator is not so protected as to be inaccessible from without while the elevator is moving, shall have attached to it some suitable appliance which shall give automatically at all times, on



every floor of said building which it approaches, a distinct and audible warning signal that said elevator is in motion. Laws, 1902, p. 44, Sec. 15.

**Hoistways and elevator openings to be protected.**—All hoistways and elevator openings through floors where there is no shaft shall be protected by railings, gates, trapdoors, or other mechanical devices equivalent thereto, and the same shall be kept closed in the night time or when not in use. Every passenger elevator, except plunger elevators, shall be provided with some safety arrangement to prevent falling, and every passenger elevator shall be fitted with some suitable device to prevent the elevator car from being started until the door or doors opening into the elevator shafts are closed; and no person under the age of eighteen years shall take charge or operate any passenger elevator. Laws, 1902, p. 44, Sec. 16.

#### TENNESSEE.

**Elevators to be protected.**—The shop and factory inspector may order the openings of all hatchways, elevator wells and well holes upon every floor of every workshop or factory where machinery is used, to be protected by

good trapdoors, self-closing hatches, or safety catches, or other safeguards, such as will insure the safety of the employees in such workshop or factory when engaged in their ordinary duties. Acts, 1899, p. 929, Sec. 4.

#### UTAH.

**inclosing shaft.** — Any person that has sunk or shall sink a shaft or well on a public domain or commons, for any purpose, shall inclose such shaft or well with a substantial curb or fence which shall be at least four and a half feet high. Revised Statutes, 1898, Sec. 1538.

**Fitting of cages.** — Hand rails and sufficient safety catches shall be attached to and a sufficient cover overhead shall be provided on every cage used for hoisting persons in any shaft. The ropes, safety-catches, links and chains shall be carefully examined every day that they are used, by a competent person employed for that purpose by the mine owner, agent, manager, or lessee, and any defect therein found shall be immediately remedied. Laws, 1901, p. 85, Sec. 7.

## WASHINGTON.

**Elevators to be inclosed.**— All hoistways, hatchways, elevator wells and well holes, as well as fly wheels and stairways in factories, mills, workshops, storehouses, warerooms or stores shall be securely fenced, inclosed or otherwise protected and due diligence shall be used to keep all such means of protection closed, except when it is necessary to have them open, that they may be used. Laws, 1903, p. 41, Sec. 2.

## WISCONSIN.

**Inspector's powers as to elevators.**— The State factory inspector, his assistant, or any officer of the bureau of labor and industrial statistics, shall examine elevators used for carrying freight or passengers, or both, and shall condemn those found to be defective or unsafe by written notice given to the proprietor or owner, or the agent of either, or by posting said notice on the elevator walls or cab. And if any elevator so condemned shall be continued in use without repairs, and loss of limb or life result therefrom, the owner or proprietor so keeping it in use shall be held fully responsi-

ble, civilly and criminally, for said loss of limb or life. [Sec. 1, Ch. 453, 1887.] S. & B. Ann. St., p. 647; Statutes, 1898, Ch. 46, 1021h.

**Elevators to be fireproof.** — The inside walls or casings of every elevator for the conveyance of passengers to and from the upper stories of any such building, as is described in the preceding section of this act (hotels, theaters, tenement houses, etc.), shall be constructed of fireproof material throughout. Laws, 1895, Ch. 355, p. 721; amending R. S., Sec. 1636d. See Laws, 1901, Sec. 7, Ch. 349.

**Child should not run elevator.** — No firm, person or corporation shall employ or permit any child under sixteen years of age to have the care, custody, management or operation of an elevator. Laws, 1903, Ch. 349, Sec. 6.



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